No. 17-1299	
Title:	**Franchise Tax Board of California, Petitioner** **v.** **Gilbert P. Hyatt**
Docketed:	March 14, 2018
Lower Ct:	Supreme Court of Nevada
Case Numbers:	(53264)
Decision Date:	December 26, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 12 2018	Petition for a writ of certiorari filed. (Response due April 13, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Apr 09 2018	Waiver of right of respondent Gilbert P. Hyatt to respond filed. **Main Document**
Apr 10 2018	Letter of April 10, 2018 from counsel for petitioner received.
Apr 13 2018	Brief amicus curiae of Multistate Tax Commission filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 13 2018	Brief amici curiae of State of Indiana and 44 other States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 24 2018	DISTRIBUTED for Conference of 5/10/2018.
May 01 2018	Response Requested. (Due May 31, 2018)
May 31 2018	Brief of respondent Gilbert P. Hyatt in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 31 2018	Waiver of the 14-day waiting period under Rule 15.5 filed by petitioner. **Main Document**
Jun 05 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 06 2018	Reply of petitioner Franchise Tax Board of the State of California filed. (Distributed)

	Main Document **Certificate of Word Count** **Proof of Service**	
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.	
Jun 28 2018	Petition GRANTED.	
Jul 03 2018	Motion to dispense with printing the joint appendix filed by petitioner Franchise Tax Board of the State of California. **Main Document** **Proof of Service**	
Jul 18 2018	Motion for an extension of time to file the opening briefs on the merits filed. **Main Document**	
Aug 01 2018	Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 11, 2018. The time to file respondent's brief on the merits is extended to and including November 15, 2018.	
Aug 24 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.	
Sep 06 2018	Blanket Consent filed by Petitioner, Franchise Tax Board of the State of California. **Blanket Consent**	
Sep 07 2018	Blanket Consent filed by Respondent, Gilbert P. Hyatt. **Blanket Consent**	
Sep 11 2018	Brief of petitioner Franchise Tax Board of the State of California filed. **Main Document** **Certificate of Word Count** **Proof of Service**	
Sep 18 2018	Brief amici curiae of Alan B. Morrison & Darien Shanske in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**	
Sep 18 2018	Brief amici curiae of Multistate Tax Commission, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**	
Sep 18 2018	Brief amici curiae of State of Indiana and 43 other States filed. **Main Document** **Certificate of Word Count** **Proof of Service**	
Sep 18 2018	Brief amici curiae of Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**	
Sep 18 2018	Brief amicus curiae of James C. Giudici in support of neither party filed.	

Sep 18 2018	Brief amici curiae of Professors William Baude and Stephen E. Sachs in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 26 2018	Withdrawal of amicus curiae brief of James C. Giudici. Letter of James C. Giudici received October 30, 2018.
Nov 15 2018	Brief of respondent Gilbert P. Hyatt filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 21 2018	Brief amici curiae of Professors of Federal Jurisdiction filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Nov 28 2018	SET FOR ARGUMENT ON Wednesday, January 9, 2019
Nov 30 2018	CIRCULATED
Dec 11 2018	Record requested from the Supreme Court of Nevada.
Dec 14 2018	Reply of petitioner Franchise Tax Board of the State of California filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 27 2018	The record from the Supreme Court of Nevada and from the Eight Judicial Dist. Court is electronic and complete.
Dec 27 2018	Record received from the Supreme Court of Nevada, one box (some SEALED documents).
Jan 09 2019	Argued. For petitioner: Seth P. Waxman, Washington, D. C. For respondent: Erwin Chemerinsky, Berkeley, Cal.

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No. 17-

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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IN THE

Supreme Court of the United States

No. 17-

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

The Franchise Tax Board of the State of California (FTB) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (App.

139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt is a former 23-year resident of California who earned hundreds of millions of dollars in licensing fees on technology patents he once owned and developed in California. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a Nevada resident, on October 1, 1991. *Hyatt I*, 538 U.S. at 490.

The Franchise Tax Board—the agency responsible for collecting personal income tax in California—became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. App. 5a. Accordingly, the FTB commenced an audit of Hyatt's 1991 return. *Id.* The audit concluded that Hyatt did not move to Nevada until April 1992, and that he had remained a California resident until that time. App. 7a. The FTB accordingly determined that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because it determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, the FTB also opened an audit for that year, which concluded that Hyatt owed an additional $6 mil-

lion in taxes and interest, plus further penalties. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those audit determinations have consumed two decades. The California State Board of Equalization, which hears appeals from the FTB's determinations, denied Hyatt's appeal as to the issues of California-sourced income and interest abatement, affirming the FTB's assessment of taxes for the 1991 tax year, and sustained Hyatt's appeals as to tax fraud and as to California residency for 1992. Administrative proceedings in California are ongoing. The Court of Appeals for the Ninth Circuit also recently affirmed the dismissal of another lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, which sought to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as California's administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed several torts in the course of auditing his tax returns—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. App. 8a. He sought compensatory and punitive damages, as well as a declaratory judgment that he resided in Nevada during the periods relevant to the FTB's audits. *Id.*

The FTB moved for summary judgment, arguing that it was entitled to immunity from suit in Nevada, as it would be in California. App. 142a. Under California

law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Full Faith and Credit Clause, together with principles of sovereign immunity and comity, required the Nevada courts to grant the FTB the same immunity. *Hyatt I*, 538 U.S. at 491-492.

The trial court denied that motion, and the FTB petitioned the Nevada Supreme Court for a writ of mandamus, arguing that the FTB was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected the FTB's claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. App. 144a & n.12. The court then ruled that the "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. App. 10a. The Nevada Supreme Court therefore allowed Hyatt's intentional tort claims to proceed.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that the FTB would receive in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have under California law. *Hyatt I*, 538 U.S. at 496.

The Court also noted that in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I*, urging the Court to overrule *Hall* as inconsistent with its other decisions on state sovereign immunity. States Amici Br. 17, No. 02-42 (U.S. Dec. 9, 2002). But because the FTB had not asked for *Hall* to be overruled, the Court declined to consider whether to do so. *Hyatt I*, 538 U.S. at 497.[1]

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties engaged in extensive discovery and pretrial proceedings in state court. Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.* The trial court added more than $2.5 million in costs and $102 million in prejudgment interest, for a total judgment exceeding $490 million. App. 11a-12a.

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[1] The Court's decision in *Hall*, which involved a traffic accident, left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. In *Hyatt I*, the Court declined to adopt this suggestion in *Hall*, and in ruling against the FTB, refused to distinguish among state interests in determining whether one State could subject another State to suit in its courts. *See* 538 U.S. at 497-499 (discussing Full Faith and Credit Clause).

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). The court held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, but affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the same $50,000 statutory damages cap that Nevada courts apply to Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. Because of several evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153. The court rejected the FTB's contention that it was entitled to the same immunity or protections as a Nevada agency. *Id.* at 145-147. The court did, however, conclude that as a matter of comity the FTB was immune from punitive damages (as Nevada agencies would be). *Id.* at 154.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). Several States filed amicus briefs at both the petition stage and merits stage in support of overruling *Nevada* v. *Hall*.

The Court divided equally on whether *Hall* should be overruled. *Hyatt II*, 136 S. Ct. at 1279. On the second question, the Court held that the Full Faith and Credit Clause does not "permit[] Nevada to award

damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. "In light of the 'constitutional equality' among the States," the Court explained, "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule of Nevada law that discriminates against its sister States." *Id.* at 1282.

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. It held that the FTB is entitled to the benefit of Nevada's statutory damages cap. App. 70a. The court therefore instructed the trial court to enter a damages award for fraud within the cap of $50,000. App. 107a. In an about-face, the court then held that a new trial was unnecessary on Hyatt's intentional infliction of emotional distress claim because the evidence at trial supported a damages award on that claim at the $50,000 cap. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming evidence it previously determined to be prejudicial as "harmless." *Id.* The court also remanded for consideration of costs and attorneys' fees. App. 124a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, App. 3a n.1, 41a.

As a result of the Nevada Supreme Court's judgment, nothing remains for the trial court to do except enter judgment against the FTB, determine which par-

ty, if any, is the prevailing party, and entertain any requests for costs and attorney's fees. App. 65a-66a.

REASONS FOR GRANTING THE PETITION

This petition presents the Court with the opportunity to answer the question that it agreed to decide in *Hyatt II*: whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled. *Hall* was wrong when it was decided and has become only more clearly wrong in the intervening years. As four Justices have already recognized, *Hall* cannot be squared with the Nation's constitutional structure. This Court should therefore grant certiorari and hold that, under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State.

I. AS FOUR MEMBERS OF THIS COURT HAVE ALREADY AGREED, *NEVADA* V. *HALL* SHOULD BE OVERRULED

Hall conflicts with the Founding-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that the principle of state sovereign immunity is inherent in the federal structure of the Union and is intended to protect the dignity interests of the States and the right of the people of the several States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should therefore be overruled.

1.a. In *Hall*, California residents injured in an automobile accident with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-412. A California jury found the state employee negligent and awarded more than $1,000,000 in damages. *Id.* at 413. This Court granted certiorari and held that constitutional principles of sovereign immunity

do not preclude one State from being haled into the courts of another State against its will. *See id.* at 426-427.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably ... was a matter of importance in the early days of independence." *Hall*, 440 U.S. at 418. The Court recognized that, at the Framing, one State would have possessed sovereign immunity in the courts of another. *Id.* at 417. And it observed that the debates over ratification of the Constitution, and later decisions of this Court, reflected "widespread acceptance of the view that a sovereign state is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. The Court recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the *federal* courts authorized by the Constitution. *Hall*, 440 U.S. at 418. But, the Court stated, it did not follow that the Framers intended to enshrine any principle of interstate sovereign immunity in the Constitution—perhaps because the notion of one State being sued in the courts of another was too outlandish to contemplate. The Court reasoned that, since the "need for constitutional protection against" the "contingency" of a state defendant being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419.

The Court then ruled that nothing in the Constitution provides "any basis, explicit or implicit," for affording sovereign immunity to a State haled into another State's courts against its will. *Hall*, 440 U.S. at 421. The Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. And it determined that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, the Court explained, a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

b. Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Hall*, 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, Justice Blackmun wrote, is that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). He explained

that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist filed a separate dissent, joined by Chief Justice Burger. He explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." *Hall*, 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist emphasized, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions." *Id.* at 437. Otherwise, they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* In Justice Rehnquist's view, *Hall* "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441.

2. *Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. In *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), for example, a Pennsylvania citizen brought suit in the Pennsylvania courts to attach property belonging to Virginia. The case "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting), claiming

that it was "a violation of the laws of nations," *Nathan*, 1 U.S. at 78. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* The Pennsylvania court agreed and dismissed the case. *Id.* at 80; *see also Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. Ct. 1781) (No. 9697).

The ratification of the Constitution did not abrogate this conception of state sovereignty. The Framing-era debates focused on the question whether States would be subject to suit in federal court. But those debates over the meaning of Article III *assumed* the unquestioned proposition that States would remain immune from suit in the courts of other States. In other words, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 263; *see also id.* at 253 (interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III); Federalist No. 81, at 487 (Hamilton) (Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted)). The "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

The force of the Founding-era conception of interstate sovereign immunity became clear after this Court held in *Chisholm* that States could be sued in federal court, without their consent, by citizens of another

State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). The furious backlash culminated in the adoption of the Eleventh Amendment, which confirms the Framers' understanding.

The Eleventh Amendment was intended to restore to the States their full "immunity from private suits." *Alden* v. *Maine*, 527 U.S. 706, 724 (1999). Although the Amendment does not explicitly address interstate sovereign immunity, it clearly shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). The federal courts were, after all, created to serve as neutral forums for the resolution of interstate disputes. A State would surely rather be tried in such a neutral forum than before a possibly partisan judge and jury in another State's courts. By precluding suit in federal forum while leaving open the worse possibility of being sued in another State's courts, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

3. *Hall* rested on two fundamental premises, both of which have been repudiated by subsequent decisions of this Court. The first is that any constitutional principle of state sovereign immunity must be located in explicit textual provisions of the Constitution, such as the Eleventh Amendment, and that the "structure of the Constitution" has no bearing on that issue. *See* 440 U.S. at 426. The second is that, beyond those textual

provisions, any question of state sovereign immunity is solely a question of comity and "wise policy." *Id.* But this Court's later decisions make clear that state sovereign immunity is inherent in the federal structure of the Constitution, even beyond the Eleventh Amendment, and that the Constitution protects the dignitary and self-government interests of the States in protecting them from suit in the courts of another sovereign. *Hall* barely acknowledged either principle, but this Court's decisions have made explicit that both are fundamental.[2]

a. This Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see also Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (state sovereign immunity a "presupposition of our constitutional structure"); *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 253 (2011); *Federal*

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[2] *Hall* was also inconsistent with prior decisions of this Court, which recognized that a sovereign State cannot be sued in any court without its consent. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court was equally clear: "[N]either a state nor the United States can be sued as defendant in *any court* in this country without their consent." *Id.* at 451 (emphasis added); *see also Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts, those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them."

Mar. Comm'n v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751-753 (2002); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 54 (1996). Whereas *Hall* effectively limited state sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-427, subsequent decisions have recognized that the Constitution protects principles of sovereign immunity beyond its literal text. *See, e.g.*, *Federal Mar. Comm'n*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-729; *Blatchford*, 501 U.S. at 779.[3]

Moreover, whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, this Court in *Alden* recognized the opposite—that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... *except as altered by the plan of the Convention*," 527 U.S. at 713 (emphasis added).[4] And whereas *Hall* casually departed from the Framing-era view of sovereign immunity, subsequent decisions have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anoma-

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[3] Decisions before *Alden*—most notably, *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—had recognized that the constitutional principle of state sovereign immunity is not limited to the scope of the Eleventh Amendment, and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to a footnote, 440 U.S. at 420 n.20.

[4] The States did, of course, partially surrender their immunity from suit in the plan of the Convention—to suits by the United States, and to suits by other States in this Court. *See* U.S. Const. art. III, § 2.

lous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 18 (1890)).

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles.

b. *Hall* gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union.[5] But later decisions, especially *Alden*, take a broader view, and recognize the importance of two principles underlying sovereign immunity.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to *sovereign dignity*." *Alden*, 527 U.S. at 715 (emphasis added). The several States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereign status, "together

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[5] To the extent *Hall* addressed the *reasons* for state sovereign immunity at all, it suggested they concerned the States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War").

with the dignity and essential attributes inhering in that status." *Id.* at 714; *see id.* at 749. The dignitary interests of the State as sovereign, though given little attention by the decision in *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental aspect of state sovereign immunity. Thus, in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, the Court explained that sovereign immunity "is designed to protect" "the *dignity and respect* afforded a State." 521 U.S. 261, 268 (1997) (emphasis added); *see Federal Mar. Comm'n*, 535 U.S. at 760, 769; *Seminole Tribe*, 517 U.S. at 58; *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).[6]

Second, and equally important, state sovereign immunity promotes self-government by the citizens of the several States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). If that danger was present in *Alden*, where the claim was that the State of Maine's conduct was subject to review in Maine's own courts (as well as jurors who, like the plaintiffs, would have been Maine residents), it is even more manifest in this case, where the actions of a California agency have been litigated before the judges and jurors of Nevada, who have no incentive to consider the cost to California's taxpayers and polity from imposing

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[6] *See generally* Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 11-28 (2003). Professor Smith, though somewhat critical of the Court's emphasis on dignity in recent decisions, acknowledges that it "is not without some precedential pedigree." *Id.* at 10; *see id.* at 28-38.

a large financial sanction on California. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—or another State. *Alden*, 527 U.S. at 751.[7]

Indeed, all of the concerns this Court expressed in *Alden* are present in this case. The State of California has been subjected to an astonishing intrusion on its dignity by being forced to defend the conduct of a core sovereign activity—its assessment of state taxes—in the courts of another State. That litigation required years of discovery and a four-month trial, and resulted in a judgment against the FTB of more than *$490 million* (though the judgment was eventually reduced due to constitutional and comity considerations). *See* App. 11a; *Hyatt II*, 136 S. Ct. at 1280. None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising out of their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

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[7] It is also difficult to reconcile *Hall* with this Court's jurisprudence recognizing the suit immunity of Indian tribes. A Tribe may not be sued in a state court (absent consent or congressional authorization), *see Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998), even when the State may substantively regulate the tribal activity giving rise to the litigation, *see Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034-2035 (2014). Allowing California to be sued in Nevada courts makes even less sense where, as here, Nevada had no authority to regulate the conduct that gave rise to respondent's lawsuit—the California authorities' conduct of audits of respondent's state tax returns.

4. Although this Court is ordinarily loath to overrule its precedents, "*stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (internal quotation marks omitted).

In deciding whether to overrule a prior decision, the Court considers "whether the decision is unsound in principle," "whether it is unworkable in practice," and the "reliance interests" at stake. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). Stare decisis also does not prevent the Court "from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As four Members of this Court have already recognized, those considerations favor overruling *Hall*; at the very least, they warrant allowing a fully constituted Court to consider *Hall*'s continuing vitality.

As explained above, *supra* pp. 11-13, *Hall*'s reasoning can "no longer withstand[] 'careful analysis'" in light of the Framing Era consensus on sovereign immunity and the Eleventh Amendment experience. *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003)). *Hall*'s rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before, during, and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal*, 504 U.S. at 783 (quoting *Garcia* v.

San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)), and should be reconsidered.[8]

Furthermore, the "development of constitutional law" since *Hall* was decided has "left [*Hall*] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992); *see supra* pp. 13-18. This Court's sovereign immunity decisions since *Hall* recognize "the structural understanding that States entered the Union with their sovereign immunity intact" and "retained their traditional immunity from suit, except as altered by the plan of the Convention or certain constitutional amendments." *Virginia Office for Prot. & Advocacy*, 563 U.S. at 253 (internal quotation marks omitted). Those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-73, federal administrative adjudications, *Federal Mar. Comm'n*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that States may not choose, as a matter of policy, to deny Indian tribes immunity in their courts, *see Kiowa*

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[8] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected Nevada's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nev.*, 503 P.2d 1363, 1364 (Cal. 1972). Second, before this Court, the *Hall* respondents largely advanced that same argument, and barely addressed the constitutional issues. *See* Resp't Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking. *See Penson* v. *Ohio*, 488 U.S. 75, 84 (1988) ("[T]ruth ... is best discovered by powerful statements on both sides of the question." (internal quotation marks omitted)).

Tribe of Okla. v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998). Thus, *Hall* is a jurisprudential outlier—both in denying States sovereign immunity, and in permitting a forum State to determine the immunity it grants to another sovereign—and can be overruled without threatening other precedents of this Court.

Hall has also proven "unworkable." *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). Under *Hall*, a State has no way of knowing whether, and to what extent, a particular forum State will confer any immunities upon it in any particular suit. And if a State should find itself denied immunity, it may face years—in this case, two decades and counting—of litigation and untold financial and administrative burdens.

This case also demonstrates the bias that a State can face in another State's courts. The Nevada jury below was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. To the extent a sovereign partially waives its sovereign immunity in its own courts, it can rely on the terms of its waiver and the jury's sense that a large verdict against the sovereign will ultimately be footed by members of the jury as taxpayers. But when a Nevada jury knows that California taxpayers will pay the tab, there is no obvious source of restraint, as the jury's verdict here attests.

Furthermore, by forcing California to defend itself against allegations that its core state function of tax assessment was deployed improperly, the Nevada courts have certainly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Coeur d'Alene Tribe*, 521 U.S. at 268. In short,

Hall has put "severe strains on our system of cooperative federalism," as the dissenters in that case warned it would. *Hall*, 440 U.S. 429-430 (Blackmun, J., dissenting).

Finally, as a constitutional decision regarding immunity, a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), *Hall* has engendered no reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). No such interests are implicated here; no parties "have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). This Court can reconsider *Hall* without harming any reasonable reliance interests.

II. This Case Remains An Ideal Vehicle To Reconsider *Hall*

1. As the Court must have concluded when it granted certiorari in *Hyatt II*, this case provides an appropriate opportunity to reconsider *Hall*.

a. The federal issue presented here was passed upon by the state courts. In a 2002 decision granting in part and denying in part the FTB's challenge to the district court's denial of its motions for summary judgment or dismissal, the Nevada Supreme Court "reject[ed]" the FTB's "argument[] that the doctrine[] of sovereign immunity ... deprive[s] the district court of subject matter jurisdiction over Hyatt's tort claims." App. 144a. Citing *Hall*, the court held that "although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts." App. 144a & n.12 (citing *Hall*).

The FTB raised the issue again after trial. The FTB argued before the Nevada Supreme Court that "*Hall*'s continuing viability is questionable" in light of more recent decisions of the Supreme Court, including *Federal Maritime Commission*, *Alden*, and *Seminole Tribe*. Pet. Nev. S. Ct. Opening Br. 101 n.80 (Aug. 7, 2009). The FTB asked the Nevada Supreme Court to recognize its immunity, explaining that a state court "may evaluate the continuing viability of an old United States Supreme Court opinion, in light of more recent changes in the economy or the law." *Id.* The Nevada Supreme Court rejected that argument by affirming a judgment in favor of Hyatt. Accordingly, the question presented is ripe for this Court's review.

b. The decision of the Nevada Supreme Court is final for purposes of this Court's appellate jurisdiction under 28 U.S.C. § 1257(a) because "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had" in the Nevada district court. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 478 (1975). The only thing left for the Nevada district court to do on remand from the Nevada Supreme Court is enter judgment in favor of Hyatt and entertain any requests for costs or fees. This Court need not "await[] the completion of the[se] additional proceedings" before reviewing the judgment. *Id.* at 477; *see Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003) (remand to consider "scope and basis for awarding attorney's fees" did not interfere with Court's jurisdiction); *Pierce Cty.* v. *Guillen*, 537 U.S. 129, 142 (2003) (reviewing state supreme court decision where "all that remains to be decided on remand ... is the amount of attorney's fees to which respondents are entitled"). The remaining "proceedings would not require the decision of other federal

questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' as well as precipitate interference with state litigation." *Cox*, 420 U.S. at 477-478 (citation omitted). Indeed, this case is in essentially the same procedural posture as when the Court granted certiorari in *Hyatt II*.

The judgment of a state high court on a federal issue will be "deemed final" where "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. The federal issue here is conclusive because if this Court recognizes the FTB's claim of sovereign immunity, the case will be finally dismissed. Furthermore, the outcome of the remaining proceedings in the Nevada district court is preordained. The Nevada Supreme Court has ordered the district court to enter judgment in favor of Hyatt. Postponing consideration of the federal issue "'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.'" *Id.*

2. The affirmance by an equally divided Court in *Hyatt II* does not prevent the Court from again granting certiorari and reconsidering *Hall*. The rule that such an affirmance is "conclusive and binding upon the parties" means only that a judgment resting on such an affirmance, once final, does not lack res judicata effect. *Durant* v. *Essex Co.*, 74 U.S. 107, 109, 113 (1868). But the Court may revisit an issue previously affirmed by an equally divided Court at a later stage of the case, before final judgment has been entered. *Cf. Neil* v.

Biggers, 409 U.S. 188, 189-192 (1972) (affirmance by equally divided Court was not an "actual adjudication by the Supreme Court" barring subsequent consideration of the issue on habeas petition).

Even if the affirmance in *Hyatt II* constituted law of the case, however, that doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Castro* v. *United States*, 540 U.S. 375, 384 (2003) (law of the case doctrine "cannot prohibit a court from disregarding an earlier holding in an appropriate case"); 18B Wright et al., *Fed. Prac. & Proc.* § 4478 (2d ed. 2017 Supp.). Moreover, law of the case doctrine is at its weakest when it comes to questions of jurisdiction and justiciability, which are more "likely to be reconsidered" than others "because of their conceptual importance" and the degree to which they are "affected with a public interest." *Fed. Prac. & Proc.* § 4478.5; *see, e.g.*, *Public Interest Research Grp. of N.J., Inc.* v. *Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997) ("[W]e conclude that the concerns implicated by the issue of standing—the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution—trump the prudential goals of preserving judicial economy and finality."); *American Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515-516 (4th Cir. 2003).

The law of the case doctrine also does not prevent a court from "depart[ing] from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona* v. *California*, 460 U.S.

605, 618 n.8 (1983). This Court has found that standard met where the Court concludes that a controlling precedent "would be decided differently under [the Court's] current" jurisprudence. *Agostini*, 521 U.S. at 236. Thus, in *Agostini*, the Court felt free to reconsider its prior decision in the same case because that decision was inconsistent with the Court's current understanding of the relevant constitutional provisions. *Id.* Accordingly, if this Court finds, as it should, that *Nevada* v. *Hall* is inconsistent with more recent cases addressing sovereign immunity, law of the case principles will present no bar to such a holding.

Moreover, by granting certiorari to consider the important question presented, the Court would not be upsetting its decision in *Hyatt II* in any but the most formalist sense; it would be rendering a decision where it previously could not. The considerations traditionally animating law of the case doctrine—judicial economy and finality—do not weigh against review where, as here, the prior decision was not rendered because of a considered judgment on the merits of the question presented, but rather because of the inability of the Court to reach a conclusive determination of the question.

3. The question presented remains as important today as it was when the Court granted certiorari in *Hyatt II*. California has already spent two decades and incurred untold costs defending itself in this suit, and it still faces additional proceedings in the Nevada district court absent this Court's review. But the effects of Hyatt's suit hardly end there. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting that he may bring a subsequent tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-094 (Dec. 5, 2016) (Hyatt's brief before California

State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. June 17, 2015) (alleging fraud by California FTB). Those suits are regrettable, yet, given *Hall*, unsurprising. Sovereign governments undertake many sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority. And in case there were any doubt that such suits disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, 23 Nev. Lawyer 22, 25 n.9 (Jan. 2015).

Although this egregious case amply demonstrates *Hall*'s shortcomings, those flaws arise in every case in which a nonconsenting State is haled into the courts of a sister State. Recently, for example, Nevada was haled into the California courts against its will. *See* Pet., *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). In that case, the plaintiff demanded monetary

and equitable relief based on Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally use them to travel to California. *Id.* at i. A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy, both of which sovereign immunity is designed to prevent. *See* Decl. of Kristine Poplawski in Supp. of Joint Request for Approval of Dismissal, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015). Other lawsuits have similarly involved challenges to state sovereign functions. *See, e.g.*, Compl., *Crutchfield Corp.* v. *Harding*, No. CL17001145-00 (Va. Cir. Ct., Albemarle Cty. Oct. 24, 2017) (suit against officials of the Massachusetts Department of Revenue in Virginia state court seeking declaration of invalidity of Massachusetts tax law); *Faulkner* v. *University of Tenn.*, 627 So. 2d 362 (Ala. 1992) (permitting suit in Alabama courts against university operated by Tennessee seeking damages and injunctive relief for decision to revoke a doctoral degree); *Head* v. *Platte Cty.*, 749 P.2d 6 (Kan. 1988) (agreeing to exercise jurisdiction over suit against Missouri county and officer of Missouri alleging a failure to train employees and establish policies concerning the execution of arrest warrants).

More generally, the spectacle of States being sued in each other's courts confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would supplant cooperative federalism with a race to the bottom. *See* 440 U.S. at 429-430 (Blackmun, J., dissenting). Other States should not be put to the burdens the FTB has faced here—two decades of litigation and the need to fight off a verdict in the hundreds of mil-

lions of dollars—before the Court has another chance to decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2018

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,
Respondent/Cross-Appellant.

Filed Dec. 26, 2017
133 Nev., Advance Opinion 102

Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

* * *

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

This matter is before us on remand from the United States Supreme Court. We previously issued an opinion in this matter concluding, in part, that appellant

Franchise Tax Board of the State of California (FTB) was not entitled to the statutory cap on damages a similarly situated Nevada agency would be entitled to under similar circumstances. *Franchise Tax Bd. of Cal. v. Hyatt* (2014 Opinion), 130 Nev., Adv. Op. 71, 335 P.3d 125, 131 (2014), *vacated*, ___ U.S. ___, 136 S. Ct. 1277 (2016), FTB petitioned the United States Supreme Court for certiorari. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, ___ U.S. ___, ___, 136 S. Ct. 1277, 1280 (2016). The Court agreed to decide two questions. *Id.* The first question was whether to overrule *Nevada v. Hall*, 440 U.S. 410 (1979), and its holding, "that one State . . . can open the doors of its courts to a private citizen's lawsuit against another State . . . without the other State's consent." *Hyatt II*, ___ U.S. at ___, 136 S. Ct. at 1279-80. The Court split 4-4 on the Hall question and thus affirmed our "exercise of jurisdiction over California's state agency." *Id.* at ___, 136 S. Ct. at 1281.

The second question was "[w]hether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* The Court held that it does not and that this court's "special rule of law" that FTB was not entitled to a damages cap that a Nevada agency would be entitled to "violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted). The Court thus granted FTB's certiorari petition, vacated our decision, and remanded the case back to us for further consideration in light of its decision. *Id.* at ___, 136 S. Ct. at 1283. In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme

Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*.[1]

In 1998, inventor Gilbert P. Hyatt sued FTB seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion

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[1] We previously issued an opinion on September 14, 2017, but withdrew that opinion on rehearing to correct an error regarding the availability of prejudgment interest under the statutory damages cap.

distress claims, fail as a matter of law, and thus, the judgment in his favor on these claims is reversed.

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, substantial evidence supports the jury's findings as to liability and an award of damages up to the amount of Nevada's statutory cap.

In connection with these causes of action, and in light of the Supreme Court's opinion in *Hyatt II*, we must address FTB's entitlement to the statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that, in accordance with *Hyatt II*, FTB is entitled to the $50,000 statutory cap on damages a similarly situated Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035(1) (1987).[2] We therefore reverse the $85 million of damages awarded to Hyatt on the fraud claim and the $1,085,281.56 of special damages awarded to Hyatt on the intentional infliction of emotional distress claim and conclude that FTB is entitled to the $50,000 statutory cap on Hyatt's fraud claim and intentional infliction of emotional distress claim.

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[2] The version of the statute in effect at the time Hyatt incurred his damages provided a statutory cap on damages awarded in a tort action against a state agency "not [to] exceed the sum of $50,000." *See* NRS 41.035(1) (1987).

We also take this opportunity to address as a matter of first impression whether, based on comity, it is reasonable to provide FTB with the same protection of California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court with instructions.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to pro-

vide certain information concerning his connections to California and Nevada and the facts surrounding his move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us[,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom

Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information

sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed. Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, the protests upheld the audits, and Hyatt went on to challenge them in the California courts.[3]

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion, invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to better bargain for and position the case to settle."

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[3] At the time of this appeal, Hyatt was still challenging the audits' conclusions in California Courts.

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district court granted FTB partial summary judgment.[4] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hy-

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[4] That ruling was not challenged in this court, and consequently, it is not part of this appeal.

att's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ petitions filed by FTB in this court in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the full faith and credit clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to

do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). In *Hyatt*, the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494. The Court upheld this court's determination that Nevada was not required to give FTB full immunity. *Id.* at 499. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under comity principles, observing that this court "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Hyatt was also awarded prejudgment interest on the awarded damages for emotional distress, invasion of privacy, and fraud. Following the trial, Hyatt moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded

approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not seek, as part of his damages at trial, economic damages for the alleged destruction of his patent-licensing business in Japan.[5]

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against FTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

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[5] This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington), to file amicus curiae briefs.

FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct

Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State ... or of any . . . employee . . . , whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983); *see also Solomon v. Su-*

preme Court of Fla., 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue. Univ.*, 544 N.E.2d 283, 285 (*Ill.* 1989); *McDonnell v. Ill.*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761, 764-66 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247, 250, 250 (N.D. 2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen*, 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke comity is within the forum state's discretion. *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424-25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g., Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 823-24, 942 P.2d 139, 144-45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27; *State v. Silva*, 86 Nev. 911, 913-14, 478 P.2d 591, 592-93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez*, 123 Nev. at 443-44,

168 P.3d at 726-27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n.3, 823 P.2d 888, 892 & n.3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the applicability of discretionary-function immunity. *Martinez*, 123 Nev, at 444-47, 168 P.3d at 727-29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). Under the *Berkovitz-Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729, When this court adopted the federal test in *Martinez*, we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id.* at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the doctrine of the law of the case should not apply

where, in the interval between two appeals of a case, there has been a change in the law by ... a judicial ruling entitled to deference" (internal quotations omitted)).

FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function immunity for intentional torts and bad-faith misconduct. Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith.

In *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The case involved negligent processing of a worker's compensation claim. Falline injured his back at work and later required surgery. *Falline*, 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006-07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide worker's compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to worker's compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his worker's compensation claims. *Id.* at 1006, 823 P.2d at 889-90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the selfinsured employer based on negligent handling of his claims. *Id.* at 100709, 823 P.2d at 890-92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891-92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline*, 107 Nev. at 1009 n.3, 823 P.2d at 892 n.3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline*, this court adopted, in *Martinez*, the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government conduct involves judgment or choice. *Id.* at 446-47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which

the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert*, 499 U.S. at 322. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez*, 123 Nev. at 445-46, 168 P.3d at 729; *Gaubert*, 499 U.S. at 324. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," discretionary-function immunity will not bar the claim. *Id.* at 324-25. The second step focuses on whether the conduct undertaken is a policy-making decision regardless of the employee's subjective intent when he or she acted. *Martinez*, 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjec-

tive intent to apply broadly or is limited to determining if the decision is a policy-making decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000).[6] These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective[ ]." *Coulthurst*, 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

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[6] *Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003). Although the Seventh Circuit in *Reynolds*, 549 F.3d at 1112, stated the proposition that claims malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay*, 349 F.3d at 431-32. *Reynolds* was published after *Palay*, and while it cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay*.

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States*, 180 F.3d at 1127, 1134-42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the determination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the *Franklin Savings* court first noted that the United States Supreme Court had "repeatedly insisted . . . that [tort] claims are not vehicles to second-guess policy-making." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz*, in *Gaubert*, to

include a query of whether the nature of the challenged conduct was "susceptible to policy analysis[,] . . . served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations omitted). The *Franklin Savings* court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[ ] on an employee's bad faith or state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140-41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141-42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

Courts that consider whether an employee subjectively intended to further policy by his or her conduct

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States*, 214

F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst*, an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging "'negligence and carelessness'" and a "'fail[ure] to diligently and periodically inspect'" the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the re-

> pairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109-11. In the end, the *Coulthurst* court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred . . . , but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts "unrelated to any plausible policy objective[]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government

employee for intentional torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[7] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

This court reviews questions of law de novo. *Martinez*, 123 Nev. at 438, 168 P.3d at 724, A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order

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[7] We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limiting its holding to whether FTB was entitled to immunity, and thus, we did not address the merits of Hyatt's claims.

or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiffs objective expectation of privacy. *PETA*, 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiffs expectation of privacy must be objectively reasonable); *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts §§ 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano*, 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.*, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

This court has never limited the application of the public records defense based on the length of time be-

tween the public disclosure and the alleged invasion of privacy. In fact, in *Montesano*, 99 Nev. 644, 668 P.2d 1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano*, Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information.[8]

Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action.[9]

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[8] Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publication of his credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. Thus, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA*, 111 Nev. at 631, 895 P.2d at 1279; *Montesano*, 99 Nev. at 649, 668 P.2d at 1084.

[9] Hyatt also argues that FTB violated his right to privacy when its agents looked through his trash, looked at a package on his doorstep, and spoke with neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued or supported by relevant authority).

False light invasion of privacy

Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA*, 111 Nev. at 622 n.4, 629, 895 P.2d at 1273 n.4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[ ] is a question of state law." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light... if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts.[10] *See Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling*, 866 N.E.2d at 1055-57; *West*, 53 S.W.3d at 646. Without recognizing the separate false light privacy tort, such an individual would be left without a remedy. *West*, 53 S.W.3d at 646.

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g., Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C.

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[10] This court, in *PETA*, while not reaching the false light issue, observed that "[t]he false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation." 111 Nev. at 622 n.4, 895 P.2d at 1274 n.4 (quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)).

1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.*, 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id.* at 903.

Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted. Because we now recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

The crux of Hyatt's false light invasion of privacy claim is that FTB's demand-for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax

cheat," and therefore, portrayed him in a false light. On appeal, FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu*, 112 Nev. at 1543, 930 P.2d at 107.

Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim.[11]

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress.

Breach of confidential relationship

A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship.[12]

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[11] Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

[12] FTB initially argues that Hyatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry*.

In *Perry*, this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945-46, 900 P.2d at 336-37. Not long after the sale, Perry stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's favor and awarded damages. *Id.* Perry appealed, arguing that this court had not recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[, and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of ac-

tion. In support of this proposition, FTB cites to *Johnson v. Sawyer*, which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson*, the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718-19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718-20. Following the plea agreement, two press releases were issued that contained improper and private information about Johnson. *Id.* at 720-21. Johnson filed suit against the IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n.47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. *Johnson*, 47 F.3d at 738 n.47. Moreover, the

parties' relationship was not akin to a family or business relationship. *Perry*, 111 Nev. at 947, 900 P.2d at 337-38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry*, but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim for a breach of confidential relationship.[13] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

A successful abuse of process claim requires "'(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.'" *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly *used the legal process* to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process, as it never sought to judicially enforce compliance with

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[13] Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g., Doe v. Medlantic Health Grp., Inc.*, 814 A.2d 939, 950-51 (D.C. 2003); *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 533-35 (Or. 1985).

the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Ct. App. 2001) (explaining that abuse of process only arises when there is actual "use of *the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines LLC v. Ultimate Distribs., Inc.*, 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence. *Taylor v. Thunder*, 116 Nev. 968, 974, 13 P.3d 43,

46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being au-

dited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations.[14] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner different than he would have otherwise, which resulted

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[14] FTB's argument concerning government agents making representations beyond the scope of law is without merit.

in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action.[15]

Fraud damages

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[16] In doing

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[15] FTB further argues that several evidentiary errors by the district court warrant a new trial. These errors include admitting evidence concerning whether the audit conclusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for a jury to find in Hyatt's favor on each required element for fraud. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgment," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

[16] The jury verdict form included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond that special damages specified in the jury verdict form, we reject this argument and limit any emotional distress damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

so, we address FTB's entitlement to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[17]

NRS 41.035 (1987) provides a statutory cap on liability damages in tort actions "against a present or former officer or employee of the state or any political subdivision." At the time Hyatt suffered his injuries in 1993, the applicable statutory cap pursuant to NRS 41.035(1) was $50,000. *See Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 768, 312 P.3d 503, 509 (2013) (noting that a tort claim accrues at the time of the plaintiffs injuries). The parties agree that NRS 41.035 applies on a per-claim basis.

The Supreme Court disagreed with our determination that FTB was not entitled to the statutory damages cap on Hyatt's fraud claim. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, ___ U.S. ___, ___, 136 S. Ct. 1277, 1281 (2016). In reviewing our prior decision, the Court noted that we "explained [our] holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [FTB] a statutory cap on damages under comity." *Id.* at ___, 136 S. Ct. at 1280 (second alteration in original) (internal quotation marks omitted). The Court determined that this explanation "cannot justify

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[17] FTB argues that under the law-of-the-case doctrine, comity applies to afford it to a statutory cap on damages and immunity from punitive damages based on this court's conclusions in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44-45, 223 P.3d 332, 334-35 (2010).

the application of a special and discriminatory rule" that would deprive FTB of the benefit of the statutory damages cap. *Id.* at ___, 136 S. Ct. at 1282. The Court held that "[w]ith respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not conflict with California law, for both laws would grant immunity. Similarly, in respect to such amounts, the policies underlying California law and Nevada's usual approach are not opposed; they are consistent." *Id.* (internal quotation marks and citation omitted).

Accordingly, although immunity with respect to damages against FTB in an amount greater than $50,000 is consistent with both Nevada and California law, California's law of *complete* immunity from recovery is inconsistent with Nevada law. *See id.* at ___, 136 S. Ct. at 1281. We thus conclude that, while FTB is not immune such that any recovery is barred in this case, FTB is entitled to the $50,000 statutory cap on damages a Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035 (1987). We thus reverse the damages award for fraud and instruct the district court to enter a damages award for fraud in the amount of $50,000. Because the statutory cap also applies to prejudgment interest on damages, we reverse the award for prejudgment interest and conclude that Hyatt is not entitled to prejudgment interest on the fraud claim because it would cause the total award to exceed $50,000. NRS 41.035(1) ("An award for damages ... may not exceed the sum of $50,000, exclusive of interest computed from the date of judgment. ..."); *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 822, 942 P.2d 139, 144 (1997) ("[C]laims for prejudgment interest are only valid when the interest award does not cause the total individual award, exclusive of post-judgment interest, attorney fees and costs, to exceed $50,000."), *abrogated*

on other grounds by Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007).

The statutory cap does not include awards for attorney fees and costs. *See Yeghiazarian*, 129 Nev. at 769, 312 P.3d at 509 (allowing recovery of attorney fees in addition to damages subject to NRS 41.035's cap). Therefore, a determination by the district court with respect to fees and costs must be made on remand.

Intentional infliction of emotional distress

During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller*, 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances sufficiently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.*, we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed,"); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983), In *Nelson*,

this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a mandate does not always require medical evidence. *See Lyman v. Huber*, 10 A.3d 707 (Me. 2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Buckman-Peirson v. Brannon*, 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiffs own testimony was necessary); *see also Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374-75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed

to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374-75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and

therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress.[18]

Trial errors at district court

FTB also claims that the jury's award should be reversed based on numerous evidentiary and jury instruction errors committed by the trial court.

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this

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[18] To the extent FTB argues that it was prejudiced by its inability to obtain Hyatts medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction that went directly to whether the audits were properly determined. FTB frames this issue as whether the district court exceeded the case's jurisdictional boundaries, but the issue more accurately involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's represent-

atives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information obtained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

The expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it was first con-

cluded that the audits' determinations were incorrect. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low- income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by FTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

FTB also argues that the district court wrongly instructed the jury. Specifically, it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that they were not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any determinations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr, Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted to make any determinations related

to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.

The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.

Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331.

Exclusion of evidence to rebut adverse inference

FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its email server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple emails to its employees, before the change, requesting that they print or otherwise save any emails related to Hyatt's case. Backup tapes containing several weeks' worth of emails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in email servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an ad-

verse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g., Bass-Davis v. Davis*, 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant emails before the server change. Hyatt challenged this evidence, arguing that it was merely an attempt to reargue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and FTB's excluded evidence did not demonstrate that the destroyed emails did not contain anything harmful.

This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass-Davis*, 122 Nev. at 447-48, 134 P.3d at 106-07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107, If the party fails to rebut the presumption, then the jury or district court may presume

that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant emails in an effort to demonstrate that none of the destroyed information contained in the emails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant emails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

FTB additionally challenges the district court's exclusion of evidence regarding Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the

district court properly excluded the evidence because it was more prejudicial than probative.

Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice ...." Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors do not warrant reversal

Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, we must determine whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error

must be prejudicial in order to warrant reversal and remand). Based on the sliding-scale approach we adopt today, the increased severity of a defendant's conduct will require less in the way of proof of emotional distress to establish an IIED claim. As noted earlier, the facts of this case are at the more extreme end of the scale. Thus, we conclude that FTB has failed to show that, but for the trial errors, a different result might have been reached, at least as to liability. On the issue of damages, we conclude that a different result would have been reached but for the trial errors. However, as with our determination on FTB's liability on Hyatt's IIED claim, we conclude that the evidence in connection with the severe treatment experienced by Hyatt supports a damages award up to the NRS 41.035(1) $50,000 damages cap. We will not compel the parties to incur the expense of a new trial. *Cf. Newman v. Kane*, 9 Nev. 234, 236 (1874) (holding that "[w]hen . . . the court has all the facts before it upon which it can render the proper judgment, it will not impose upon the parties the expense of a new trial"). We therefore reverse the award of damages on the IIED claim and remand this matter to the district court with instructions to enter a damages award on Hyatt's IIED claim in the amount of $50,000. *Cf. Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (concluding that jury award of damages was excessive as a matter of law and reducing damages to "the maximum amount that could be reasonably awarded under the[ ] circumstances"). Because this damages award on the IIED claim is the maximum allowed by NRS 41.035(1), Hyatt is not entitled to prejudgment interest.[19] *See Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 822,

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[19] As noted above, the statutory cap on damages does not apply to awards for attorney fees costs.

942 P.2d 139, 143-44 (1997), *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007).

Punitive damages

The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte*, 293 S.E.2d 101, 114 (N.C. 1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort . . . may not include any amount as exemplary or punitive." Thus, Nevada has not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for their government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if

provided for by statute, and Nevada has a statute authorizing such damages—NRS 42.005.[20]

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies under NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding, *Georgia v. City of East Ridge, Tennessee*, 949 F. Supp. 1571, 1581 (N.D. Ga. 1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages

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[20] Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, 26 U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statute does not exist here.

against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

Costs

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award is required when this court reverses the underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are multiple defendants, unless it is "rendered impracticable by the interrelationship of the claims"); *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856

P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special master's recommendation, but the district court concluded that FTB could not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle*, this court stated that even if no extension of time was granted by the district court, the fact that it favorably awarded the costs requested demonstrated

that it impliedly granted additional time. *Id.* The *Eberle* court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court erred when it precluded FTB from filing its objections. On remand, if the district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that

prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic damages by losing millions of dollars of potential licensing revenue because he alleges that the Japanese market effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

Damages "cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of "'whether the testimony comes from the mouth of a lay witness or an expert." *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Horgan v. Indart*, 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another infer-

ence; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Horgan*, 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his claim for damages, e.g., evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result, Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was re-

quired, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be proven. Here, Hyatt only set forth expert testimony detailing what his experts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) (recognizing that to avoid summary judgment once the movant has properly sup-

ported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. However, we reverse the amount of damages awarded, as we have determined that FTB is entitled to NRS 41.035(1)'s $50,000 statutory cap on damages under comity principles. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability. We also conclude that sufficient evidence supports a damages award up to NRS 41.035(1)'s $50,000 statutory cap and thus determine that the district court should award Hyatt damages in that amount for his IIED claims. We conclude that Hyatt is not entitled to prejudgment interest on these damages awards because an award of prejudgment interest would impermissibly exceed NRS 41.035(1)'s $50,000 statutory cap. We further hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also reverse the costs awards and remand to the district court for a new determination with re-

spect to attorney fees and costs in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal, nor do we consider FTB's second request that this court take judicial notice of certain publicly available documents.

/s/ Hardesty, J.
Hardesty

We concur:

/s/ Cherry, C.J.
Cherry

/s/ Douglas, J.
Douglas

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

/s/ Stiglich, J.
Stiglich

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,
Respondent/Cross-Appellant.

Filed Sept. 14, 2017
Withdrawn December 26, 2017
133 Nev., Advance Opinion 57

Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

* * *

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

This matter is before us on remand from the United States Supreme Court. We previously issued an

opinion in this matter concluding, in part, that appellant Franchise Tax Board of the State of California (FTB) was not entitled to the statutory cap on damages a similarly situated Nevada agency would be entitled to under similar circumstances. *Franchise Tax Bd. of Cal. v. Hyatt* (2014 Opinion), 130 Nev., Adv. Op. 71, 335 P.3d 125, 131 (2014), *vacated*, ___ U.S. ___, 136 S. Ct. 1277 (2016). FTB petitioned the United States Supreme Court for certiorari. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), ___ U.S. ___, ___, 136 S. Ct. 1277, 1280 (2016). The Court agreed to decide two questions. *Id.* The first question was whether to overrule *Nevada v. Hall*, 440 U.S. 410 (1979), and its holding, "that one State . . . can open the doors of its courts to a private citizen's lawsuit against another State . . . without the other State's consent." *Hyatt II*, ___ U.S. at ___, 136 S. Ct. at 1279-80. The Court split 4-4 on the Hall question and thus affirmed our "exercise of jurisdiction over California's state agency." *Id.* at ___, 136 S. Ct. at 1281.

The second question was "[w]hether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* The Court held that it does not and that this court's "special rule of law" that FTB was not entitled to a damages cap that a Nevada agency would be entitled to "violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted). The Court thus granted FTB's certiorari petition, vacated our decision, and remanded the case back to us for further consideration in light of its decision. *Id.* at ___, 136 S. Ct. at 1283. In light of the Court's ruling, we reissue our vacated opinion except as

to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*.

In 1998, inventor Gilbert P. Hyatt sued FTB seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion distress claims, fail as a matter of law, and thus, the judgment in his favor on these claims is reversed.

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, substantial evidence supports the jury's findings as to liability and an award of damages up to the amount of Nevada's statutory cap.

In connection with these causes of action, and in light of the Supreme Court's opinion in *Hyatt II*, we must address FTB's entitlement to the statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that, in accordance with *Hyatt II*, FTB is entitled to the $50,000 statutory cap on damages a similarly situated Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035(1) (1987).[1] We therefore reverse the $1,085,281.56 of special damages awarded to Hyatt and conclude that FTB is entitled to the $50,000 statutory cap on Hyatt's fraud claim and intentional infliction of emotional distress claim.

We also take this opportunity to address as a matter of first impression whether, based on comity, it is reasonable to provide FTB with the same protection of

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[1] The version of the statute in effect at the time Hyatt incurred his damages provided a statutory cap on damages awarded in a tort action against a state agency "not [to] exceed the sum of $50,00." *See* NRS 41.035(1) (1987).

California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court with instructions.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to provide certain information concerning his connections to California and Nevada and the facts surrounding his

move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us[,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as

contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that

Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed.

Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, the protests upheld the audits, and Hyatt went on to challenge them in the California courts.[2]

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion, invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to better bargain for and position the case to settle."

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[2] At the time of this appeal, Hyatt was still challenging the audit's conclusions in California courts.

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district court granted FTB partial summary judgment.[3] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hy-

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[3] That ruling was not challenged in this court, and consequently, it is not part of this appeal.

att's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ petitions filed by FTB in this court in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the full faith and credit clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to

do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). In *Hyatt*, the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494. The Court upheld this court's determination that Nevada was not required to give FTB full immunity. *Id.* at 499. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under comity principles, observing that this court "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Following the trial, Hyatt sought prejudgment interest and moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not seek, as part of his damages at trial, economic damages for the alleged destruction of his patent-licensing business in Japan.[4]

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against FTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

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[4] This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington) to file amicus curiae briefs.

FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct

Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State . . . or of any . . . employee . . . , whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983); *see also Solomon v. Su-*

preme Court of Fla., 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Ill.*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761, 764-66 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247, 250, 250 (N.D. 2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen*, 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke comity is within the forum state's discretion. *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424-25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g., Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 823-24, 942 P.2d 139, 144-45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27; *State v. Silva*, 86 Nev. 911, 913-14, 478 P.2d 591, 592-93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez*, 123 Nev. at 443-44,

168 P.3d at 726-27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n.3, 823 P.2d 888, 892 & n.3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the applicability of discretionary-function immunity. *Martinez*, 123 Nev. at 444-47, 168 P.3d at 727-29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). Under the *Berkovitz-Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729. When this court adopted the federal test in *Martinez*, we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id.* at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the doctrine of the law of the case should not apply

where, in the interval between two appeals of a case, there has been a change in the law by ... a judicial ruling entitled to deference" (internal quotations omitted)).

FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function immunity for intentional torts and bad-faith misconduct. Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith.

In *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The case involved negligent processing of a worker's compensation claim. Falline injured his back at work and later required surgery. *Falline*, 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006-07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide worker's compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to worker's compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his worker's compensation claims. *Id.* at 1006, 823 P.2d at 889-90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the self-insured employer based on negligent handling of his claims. *Id.* at 1007-09, 823 P.2d at 890-92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891-92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline*, 107 Nev. at 1009 n.3, 823 P.2d at 892 n.3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline*, this court adopted, in *Martinez*, the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government conduct involves judgment or choice. *Id.* at 446-47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which

the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert*, 499 U.S. at 322. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez*, 123 Nev. at 445-46, 168 P.3d at 729; Gaubert, 499 U.S. at 324. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," discretionary-function immunity will not bar the claim. *Id.* at 324-25. The second step focuses on whether the conduct undertaken is a policy-making decision regardless of the employee's subjective intent when he or she acted. *Martinez*, 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjec-

tive intent to apply broadly or is limited to determining if the decision is a policy-making decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000).[5] These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective[]." *Coulthurst*, 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

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[5] *Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States*, 349 F.3d 418, 431-31 (7th Cir. 2003). Although the Seventh Circuit in *Reynolds*, 549 F.3d at 1112, stated that the proposition that claims of malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay*, 349 F.3d at 432-32. *Reynolds* was published after *Palay*, and while it cites *Palay* for other unrelated issues, it does not address its hlding in connection with the holding in *Palay*.

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States*, 180 F.3d at 1127, 1134-42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the determination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the Franklin Savings court first noted that the United States Supreme Court had "repeatedly insisted ... that [tort] claims are not vehicles to second-guess policy-making." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz*, in *Gaubert*, to

include a query of whether the nature of the challenged conduct was "susceptible to policy analysis[,] ... served to emphasize that courts should not inquire into the actual state of mind or decision making process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations omitted). The Franklin Savings court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[] on an employee's bad faith or state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140-41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141-42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

Courts that consider whether an employee subjectively intended to further policy by his or her conduct

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States*, 214

F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst*, an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging "'negligence and carelessness'" and a "'fail[ure] to diligently and periodically inspect'" the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the re-

> pairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109-11. In the end, the Coulthurst court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred ... , but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts "unrelated to any plausible policy objective[ ]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government

employee for intentional torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[6] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

This court reviews questions of law de novo. *Martinez*, 123 Nev. at 438, 168 P.3d at 724. A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order

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[6] We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limited its holding to whether FTB was entitled to immunity, and this, we did not address the merits of Hyatt's claims.

or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. *PETA*, 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiff's expectation of privacy must be objectively reasonable); *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts § 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano*, 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.*, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

This court has never limited the application of the public records defense based on the length of time be-

tween the public disclosure and the alleged invasion of privacy. In fact, in *Montesano*, 99 Nev. 644, 668 P.2d 1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano*, Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information.[7]

Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action.[8]

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[7] Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publications of this credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. This, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA*, 111 Nev. At 631, 895 P.2d at 1279; *Montesano*, 99 Nev. At 649, 668 P.2d at 1084.

[8] Hyatt also argues that FTB violated his right to privacy when its agents looked through his trach, looked at a package on his doorstep, and spoke with neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n. 38 (2006) (explaining that this court need not consider claims that are no cogently argued or supported by relevant authority).

False light invasion of privacy

Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA*, 111 Nev. at 622 n.4, 629, 895 P.2d at 1273 n.4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[ ] is a question of state law." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light... if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts.[9] *See Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling*, 866 N.E.2d at 1055-57; *West*, 53 S.W.3d at 646. Without recognizing the separate false light privacy tort, such an individual would be left without a remedy. *West*, 53 S.W.3d at 646.

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g., Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C.

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[9] This court, in *PETA*, while not reaching the false light issue, observed that "'[t]he false light privacy action differs from a defamation action in that the injury in privacy actions in mental distress from having been exposed to a public view, while the injury in defamation actions is damage to reputation.'" 111 Nev. At 622 n.4, 895 P.2d at 1274 n.4 (quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)).

1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.*, 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id.* at 903.

Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted. Because we now recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

The crux of Hyatt's false light invasion of privacy claim is that FTB's demand-for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax

cheat," and therefore, portrayed him in a false light. On appeal, FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu*, 112 Nev. at 1543, 930 P.2d at 107.

Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim.[10]

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress.

Breach of confidential relationship

A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship.[11]

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[10] Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

[11] FTB initially argues that Hayatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry*.

In *Perry*, this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945-46, 900 P.2d at 336-37. Not long after the sale, Perry stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's favor and awarded damages. *Id.* Perry appealed, arguing that this court had not recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[, and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in Perry to establish a breach of confidential relationship cause of ac-

tion. In support of this proposition, FTB cites to *Johnson v. Sawyer*, which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson*, the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718-19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718-20. Following the plea agreement, two press releases were issued that contained improper and private information about Johnson. *Id.* at 720-21. Johnson filed suit against the IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n.47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. *Johnson*, 47 F.3d at 738 n.47. Moreover, the

parties' relationship was not akin to a family or business relationship. *Perry*, 111 Nev. at 947, 900 P.2d at 337-38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry*, but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim for a breach of confidential relationship.[12] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

A successful abuse of process claim requires "'(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.'" *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly used the legal process to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process,

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[12] Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g., Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 950-51 (D.C. 2003); *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 533-35 (Or. 1985).

as it never sought to judicially enforce compliance with the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Ct. App. 2001) (explaining that abuse of process only arises when there is actual "*use of the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines LLC v. Ultimate Distribs., Inc.*, 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial ev-

idence. *Taylor v. Thunder*, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that

FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations.[13] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner

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[13] FTB's argument concerning government agents making representations beyond the scope of law is without merit.

different than he would have otherwise, which resulted in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action.[14]

Fraud damages

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing

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[14] FTB further argues that several evidentiary errors by the disctrict court warrant a new trial. These errors include admitting evidence concerning whether the audit conlcusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for the jury to find in Hyatt's favor on each required element for fraud. *See Cook v. Sunrise Hosp. & Med. Ct., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgement," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 284 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

[15] The jury verdict from included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond the special damages specified in the jury verdict form, we reject this argument and limit any emotional distress

so, we address FTB's entitlement to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16]

NRS 41.035 (1987) provides a statutory cap on liability damages in tort actions "against a present or former officer or employee of the state or any political subdivision." At the time Hyatt suffered his injuries in 1993, the applicable statutory cap pursuant to NRS 41.035(1) was $50,000. *See Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 768, 312 P.3d 503, 509 (2013) (noting that a tort claim accrues at the time of the plaintiff's injuries). The parties agree that NRS 41.035 applies on a per-claim basis.

The Supreme Court disagreed with our determination that FTB was not entitled to the statutory damages cap on Hyatt's fraud claims. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, ___ U.S. ___, ___, 136 S. Ct. 1277, 1281 (2016). In reviewing our prior decision, the Court noted that we "explained [our] holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [FTB] a statutory cap on damages under comity." *Id.* at ___, 136 S. Ct. at 1280 (second alteration

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damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

[16] FTB argues that under the law-of-the-case doctrine, comity applies to afford it a statutory cap on damages and immunity from punitive damages based on this court's conclusion in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44-4, 223 P.3d 332, 334-35 (2010).

in original) (internal quotation marks omitted). The Court determined that this explanation "cannot justify the application of a special and discriminatory rule" that would deprive FTB of the benefit of the statutory damages cap. *Id.* at ___, 136 S. Ct. at 1282. The Court held that "[w]ith respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not conflict with California law, for both laws would grant immunity. Similarly, in respect to such amounts, the policies underlying California law and Nevada's usual approach are not opposed; they are consistent." *Id.* (internal quotation marks and citation omitted).

Accordingly, although immunity with respect to damages against FTB in an amount greater than $50,000 is consistent with both Nevada and California law, California's law of *complete* immunity from recovery is inconsistent with Nevada law. *See id.* at ___, 136 S. Ct. at 1281. We thus conclude that, while FTB is not immune such that any recovery is barred in this case, FTB is entitled to the $50,000 statutory cap on damages a Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035 (1987). We thus reverse the damages award for fraud and instruct the district court to enter a damages award for fraud in the amount of $50,000.

Although we conclude that FTB is entitled to NRS 41.035's cap on damages, we note that the cap does not apply to awards for prejudgment interest. NRS 41.035(1) ("An award of damages . . . may not exceed the sum of $50,000, exclusive of interest computed from the date of judgment"). Similarly, the statutory cap does not include awards for attorney fees and costs. *See Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 769, 312 P.3d 503, 509 (2013) (allowing recovery of attorney fees in addition to damages subject to NRS 41.035's cap). Therefore, a determination by the

district court with respect to prejudgment interest and fees and costs must be made on remand.

Intentional infliction of emotional distress

During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller*, 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances suffi-

ciently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.*, we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983), In *Nelson*, this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a

mandate does not always require medical evidence. *See Lyman v. Huber*, 10 A.3d 707 (Me. 2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Buckman-Peirson v. Brannon*, 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiff's own testimony was necessary); *see also Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374-75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374-75, 725 P.2d at 236. In so

holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to the how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he be-

came distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress.[17]

Trial errors at district court

FTB also claims that the jury's award should be reversed based on numerous evidentiary and jury instruction errors committed by the trial court.

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction that went directly to whether the audits were properly determined. FTB frames this issue as whether the dis-

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[17] To the extent FTB argues that it was prejudiced by its inability to obtain Hyatt's medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

trict court exceeded the case's jurisdictional boundaries, but the issue more accurately involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information ob-

tained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

The expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it was first concluded that the audits' determinations were incorrect. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low-income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by FTB is precisely

what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

FTB also argues that the district court wrongly instructed the jury. Specifically, it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that they were not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any deter-

> minations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr. Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.
>
> The residency and tax assessment determinations, and all factual and legal issues related

> thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.
>
> Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency

determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331.

Exclusion of evidence to rebut adverse inference

FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its email server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple emails to its employees, before the change, requesting that they print or otherwise save any emails related to Hyatt's case. Backup tapes containing several weeks' worth of emails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in email servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g., Bass-Davis v. Davis*, 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant emails before the server change. Hyatt challenged this evidence, arguing that it was merely an attempt to rear-

gue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and FTB's excluded evidence did not demonstrate that the destroyed emails did not contain anything harmful.

This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass-Davis*, 122 Nev. at 447-48, 134 P.3d at 106-07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107. If the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court

nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant emails in an effort to demonstrate that none of the destroyed information contained in the emails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant emails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

FTB additionally challenges the district court's exclusion of evidence regarding Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the district court properly excluded the evidence because it was more prejudicial than probative.

Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice ...." Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial

as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors do not warrant reversal

Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, we must determine whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand). Based on the sliding-scale approach we adopt today, the increased severity of a defendant's conduct will require less in the way of proof of emotional distress to establish an IIED claim. As noted earlier, the facts of this case are at the more extreme end of the scale. Thus, we conclude that FTB has failed to show that, but for the trial errors, a different result might have been reached, at least as to liability. On the issue of damages, we conclude that a different result would have been reached but for the trial errors. However, as with our determination on FTB's liability on Hyatt's

IIED claim, we conclude that the evidence in connection with the severe treatment experienced by Hyatt supports a damages award up to the NRS 41.035(1) $50,000 damages cap. We will not compel the parties to incur the expense of a new trial. *Cf Newman v. Kane*, 9 Nev. 234, 236 (1874) (holding that "[w]hen . . . the court has all the facts before it upon which it can render the proper judgment, it will not impose upon the parties the expense of a new trial"). We therefore reverse the award of damages on the IIED claim and remand this matter to the district court with instructions to enter a damages award on Hyatt's IIED claim in the amount of $50,000.[18] *Cf Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (concluding that jury award of damages was excessive as a matter of law and reducing damages to "the maximum amount that could be reasonably awarded under the[] circumstances").

Punitive damages

The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte*, 293

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[18] As noted above, the statutory cap on damages does not apply to awards for prejudgment interest or fees and costs.

S.E.2d 101, 114 (N.C. 1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort ... may not include any amount as exemplary or punitive." Thus, Nevada has not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for their government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if provided for by statute, and Nevada has a statute authorizing such damages—NRS 42.005.[19]

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies un-

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[19] Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statue does not exist here.

der NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding, *Georgia v. City of East Ridge, Tennessee*, 949 F. Supp. 1571, 1581 (N.D. Ga. 1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

Costs

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award

is required when this court reverses the underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf. Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are multiple defendants, unless it is "rendered impracticable by the interrelationship of the claims"); *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special master's recommendation, but the district court concluded that FTB could

not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle*, this court stated that even if no extension of time was granted by the district court, the fact that it favorably awarded the costs requested demonstrated that it impliedly granted additional time. *Id.* The Eberle court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court

erred when it precluded FTB from filing its objections. On remand, if the district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic damages by losing millions of dollars of potential licensing revenue because he alleges that the Japanese market effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

Damages "cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of "'whether the testimony comes from the mouth of a lay witness or an expert.'" *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Horgan v. Indart*, 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Horgan*, 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his claim for damages, e.g., evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result. Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was required, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be proven. Here, Hyatt only set forth expert testimony detailing what his ex-

perts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) (recognizing that to avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. However, we reverse the amount of damages awarded, as we have determined that FTB is entitled to NRS 41.035(1)'s $50,000 statutory cap on damages under comity principles. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability. We also conclude that sufficient evidence supports a dam-

ages award up to NRS 41.035(1)'s $50,000 statutory cap and thus determine that the district court should award Hyatt damages in that amount for his IIED claims. We further hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also remand the prejudgment interest and the costs awards to the district court for a new determination in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal, nor do we consider FTB's second request that this court take judicial notice of certain publicly available documents.

/s/ Hardesty, J.
Hardesty

We concur:

/s/ Cherry, C.J.
Cherry

/s/ Douglas, J.
Douglas

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

/s/ Stiglich, J.
Stiglich

APPENDIX C

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA; and does 1-100, inclusive
Defendants,

Dated: January 29, 2009, 9:00 a.m.
Filed: February 2, 2009
(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)

ORDER DENYING:

(1) FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND

(2) FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59

This matter having come before the Court on January 29, 2009, for hearing the Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law or Alternatively, and Conditionally

Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as oral arguments at the hearing; and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same hereby are denied.

Dated this 2 day of Feb., 2009.

s/Jessie Walsh
DISTRICT JUDGE

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,
Respondent/Cross-Appellant.

Filed Dec. 26, 2017

ORDER GRANTING PETITION FOR REHEARING

Having considered the petition for rehearing and answer to the petition, we have determined that rehearing of this matter is warranted. Accordingly, the petition for rehearing is granted and we withdraw our opinion that appears at 133 Nev., Adv. Op. 57 (Sept. 14, 2017). This matter shall stand submitted on the briefs and record previously filed. *See* NRAP 40(e).

It is so ORDERED.

Hardesty, [A]C.J.

cc: McDonald Carano LLP/Reno
Lewis Roca Rothgerber Christie LLP/Las Vegas
Lemons, Grundy & Eisenberg
Hutchison & Steffen, LLC/Las Vegas

Kaempfer Crowell/Las Vegas
Perkins Coie LLP
Eighth District Court Clerk

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,
Respondent/Cross-Appellant.

Filed February 1, 2018

ORDER TO STAY ISSUANCE OF REMITTUR

On December 26, 2017, this court entered an opinion affirming in part, reversing in part, and remanding with instructions the judgment of the district court. *Franchise Tax Board of Cal. v. Hyatt*, 133 Nev., Adv. Op. 102. ___ P.3d ___ (2017). Appellant/cross-respondent has filed a motion to stay the remittitur pending submission of a petition for a writ of certiorari to the United States Supreme Court.

Cause appearing, we grant the motion. *See* NRAP 41(b)(3). We hereby stay issuance of the remittitur until May 22, 2018. If the clerk of this court receives written notice by May 22, 2018, from the clerk of the United States Supreme Court that appellant has filed a petition for a writ of certiorari, the stay shall continue in

effect until final disposition of the certiorari proceedings. If such notice is not received by May 22, 2018, the remittitur shall issue forthwith.

It is so ORDERED.

Douglas, C.J.

cc: Hon. Jessie Elizabeth Walsh, District Judge.
McDonald Carano LLP/Reno
Lewis Roca Rothgerber Christie LLP/Las Vegas
Hutchison & Steffen, LLC
Kaempfer Crowell
Perkins Coie LLP
Eighth District Court Clerk

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 35549

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND AROUND THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE,
Respondents.

and

GILBERT P. HYATT, Real Party in Interest.

No. 36390

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND AROUND THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE,
Respondents.

and

GILBERT P. HYATT, Real Party in Interest.

ORDER, GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

(Filed April 4, 2002)

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt – a long-time California resident who moved to Clark County, Nevada – to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted

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[1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an *amicus curiae* brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary writ is not

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[2] NRS 34.160 (mandamus).

[3] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4] NRS 34.320 (prohibition).

available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A Petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly provided its state

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[5] NRS 34.170; NRS 34.330.

[6] *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7] *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

[8] *Id.*

[9] NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code§ 820.

[10] *See* NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*,

taxation agency, Franchise Tax Board, with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to governwith respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we

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113 Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

[11] *See* Cal. Gov't Code §860.2; *Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12] *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).

[13] *Id.* at 421-24.

[14] *Id.* at 414-21.

[15] *Motenko v MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

Comity

The doctrine of comity, is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation

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[16] *Nevada v Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17] *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

[18] Cal. Gov't Code § 860.2; *see Mitchell*, 228 Cal. Rptr. at 752.

is generally considered to be a discretionary function,[19] and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

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[19] *Foster*, 114 Nev. at 941-43, 964 P.2d at 792.

[20] NRS 41.032(2).

[21] *See Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and other

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[22] *See Constal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23] *See In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

[24] *See Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is, protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim

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[25] *See Coastal States*, 617 F.2d at 862-64.

[26] *See Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

[27] *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta. District Judge
California Attorney General
McDonald Carano Wilson McCune

---

[28] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune
Frankovich & Hicks LLP/Reno
Bernhard & Leslie
Hutchison & Steffen
Riordan & McKenzie
Thomas K Bourke
Marquis & Aurbach
Clark County Clerk

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianecki v. District Court*,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

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[1] 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]

/s/ Rose, J.
Rose

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[2] *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

APPENDIX G

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,
Plaintiff,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA; and does 1-100, inclusive
Defendants,

Filed: May 31, 2000

ORDER

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L. Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b),

or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

Dated this 31 day of May, 2000.

s/ Nancy M. Saitta
DISTRICT COURT JUDGE
NANCY M. SAITTA

No. 17-1299

In The

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether petitioner has shown a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Gilbert P. Hyatt respectfully opposes the Petition for a Writ of Certiorari by the Franchise Tax Board of the State of California in this case.

STATEMENT

This is the continuation of litigation that has been going on for over a quarter of a century and it is back in this Court for the third time. *Franchise Tax Board v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

The Underlying Facts

This is a state-law tort suit brought in Nevada state courts and is one of several disputes between Gilbert P. Hyatt and petitioner California Franchise Tax Board ("the Board"). The original dispute arose out of a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that Hyatt, a former California resident, became a permanent resident of Nevada. Hyatt contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that Hyatt became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California. *See, e.g., Hyatt v. Yee*, 871 F.3d 1067 (9th Cir. 2017) (holding that Hyatt could not

enjoin Franchise Tax Board proceedings based on constitutional violations and the lengthy delay in the proceedings).[1]

This lawsuit concerns tortious acts committed by the Board and its employees against Hyatt. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. According to testimony from a former Board employee, the auditor freely discussed personal information about Hyatt – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After Cox had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (filed Dec. 21, 2009). The auditor's

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[1] At a final hearing in August 2017, the California State Board of Equalization found five out of six tax issues in favor of Hyatt including that his Nevada residency began on October 20, 1991. The Franchise Tax Board has petitioned for rehearing with the California Office of Tax Appeals, a matter which is still pending. In the Matter of the Appeals of Gilbert P. Hyatt, California Office of Tax Appeals Case Nos. 435770 and 446509.

incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. *See* 4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, Ms. Cox pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and estranged members of Hyatt's family against him. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. Cox often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Franchise Tax Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with information "[d]emand[s]" about Hyatt and disclosed his home address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his places of worship. *See* 83 RA at 020653-54, 020668-69, 020735-36. The Board also disclosed its investigation of Hyatt to Hyatt's patent licensees in Japan. *See* 84 RA at 020788, 020791. The Board knew that Hyatt, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, an attorney representing Hyatt, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and Hyatt understood the Board employee to be pushing for tax payments as the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74:23.2.

The Initial Litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although it is clearly established that a state does not have sovereign immunity when sued in the courts of another state, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Board of California v.*

Hyatt, Nos. 35549 and 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Id. The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Id.

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Id. at *8. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Id. at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Id. (citation omitted). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Id.

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Id. at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." Id. The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." Id. at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The Trial, Verdict, and Review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional

torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Board of California v. Hyatt*, 335 P.2d 125 (Nevada 2014). In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim). Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that Hyatt had not established the necessary elements for various torts under Nevada law.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." Id. at 145. The court thus determined "that substantial evidence supports each of the fraud elements." Id.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" Id. at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[ ] outside such controls in this State.'" Id. (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." Id. With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that Hyatt had "suffered extreme treatment" at the hands of the Board (id. at 148) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the

Board was entitled to a new trial to determine the proper level of damages. Id. at 159-63.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." Id. at 153. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." Id.

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277, 1280 (2016).

After briefing and oral argument, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against

California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." Id. at 1281. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The Case on Remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of Nevada's statutory damages cap. The Nevada Supreme Court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. Id. at 121a-22a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also said that the statutory damages cap includes prejudgment interest.

REASON FOR DENYING THE WRIT

THERE IS NO COMPELLING JUSTIFICATION FOR OVERRULING *NEVADA V. HALL*

The sole issue presented in this case is whether this Court should overrule its almost 30-year-old precedent in *Nevada v. Hall*.

"The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). The Court has emphasized "that *stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Petitioner and its *amici* offer no such compelling justification for overruling *Nevada v. Hall*. The decision is almost 30 years old and yet Petitioner and its *amici* point to only a relatively small number of cases against state governments in the courts of other states and document little burden on state governments from such litigation. *See* Brief of Indiana and 44 Other States as *Amici Curiae* in Support of Petitioner, pp. 8-10. Suits against states in state court – rare before the decision in *Nevada v. Hall* – are still rare today. *See* Jeffrey W. Stempel, "*Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury," 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive."). Furthermore, in those infrequent instances when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister states, as the Nevada Supreme Court did here. *See, e.g., Cox v. Roach*, 723 S.E.2d 340 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006).

The primary argument advanced by Petitioner and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Petition for a Writ of Certiorari at 11-19. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v.*

Hall: the difference between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. Nevada plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada.

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. The Court explained that sovereign immunity means that "no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Nevada v. Hall*, 440 U.S. at 416.

Relying on precedent from the earliest days of American history – Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S.

(7 Cranch) 116 (1812) – the Court in *Nevada v. Hall* concluded that sovereign immunity was never meant to protect a state from suits in another state's court. Id. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See, e.g., The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822). *See* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity.").

Nevada v. Hall was based on three basic and unassailable premises. First, prior to formation of the Union, the states were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations. Second, that, before the founding of the United States (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation. Third, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states, giving priority to the rights of visiting states at the expense of host states.

This is why Petitioner is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Petition for a Writ of Certiorari at 13-19. *Alden v. Maine* is about the ability of a state to be sued in its own state courts, something this Court said was precluded by an immunity that has existed throughout American history. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another.*" 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated: "In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here – that the Constitution reserves to the states a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress." Id. at 739-40.

Petitioner and its *amici* stress state sovereignty, but they ignore that keeping a state from hearing suits is itself a significant limit on state prerogatives. Indeed, in *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state

sovereignty. The Court declared: "It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States – and the power of the people – in our Union." *Nevada v. Hall*, 440 U.S. at 426-27.

Petitioner and its *amici* do not cite a single word showing that, at the time of the writing and ratification of the Constitution, either the Framers or representatives of the states addressed a state's immunity from suit in another state's courts. Nothing in the text of the Constitution or its history supports giving a state sovereign immunity protection when it is sued in another state's courts. To be sure, there were many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state.

This does not mean that states are without protection from suit in other state courts. As this Court held when this case was last before the Court, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. This matters in protecting state governments. In this case, the jury's award of $139 million in

compensatory damages and $250 million in punitive damages now has been reduced to $100,000.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that punitive damages are not available against the Board because of considerations of comity.

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

Thus, this Court should deny the Petition for a Writ of Certiorari that asks it to reconsider an almost 30-year-old precedent that was based on decisions from the earliest days of American history. As this Court has noted: "[A]n argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015). Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.'"

Id. (citations omitted). No such "special justification" exists to warrant reconsideration of *Nevada v. Hall*.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

This Court has already once granted certiorari to consider whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled, and four Members of an equally divided Court voted to answer that question in the affirmative. The question remains as worthy of review as it was two Terms ago. And this case remains an ideal vehicle for addressing it, as Hyatt does not dispute.

Instead of raising any vehicle concern, Hyatt tries to minimize the importance of the question presented. But an extraordinary 45 States have filed an amicus brief explaining *Hall*'s "sustained nationwide impact" and the extent to which it "insult[s] ... the most fundamental notions of State sovereignty." States Br. 11. Hyatt's other arguments against certiorari are that *Hall* was correctly decided and that it should be pre-

served by stare decisis. But even if those arguments had force—which they do not—they are properly addressed at the merits stage. They supply no reason to deny certiorari, particularly when four Justices have already disagreed with them.

The Court should not pass up this opportunity to resolve, at last, a question implicating fundamental principles of state sovereignty and our constitutional structure.

I. THE QUESTION PRESENTED IS DEEPLY IMPORTANT

Hyatt attempts (at 12, 16-17) to diminish the importance of the question presented by suggesting that States are only rarely sued in other States' courts, that allowing such suits imposes minimal burdens on the defendant States, and that comity or interstate compacts are adequate substitutes for interstate sovereign immunity. Those arguments are incorrect.

1. As the amici States explain, "[a]s a result of *Hall*, State courts commonly exercise jurisdiction over officials and agencies of other States." States Br. 8. They identify four cases challenging state taxation that were pending in other States' courts in the first few months of 2018 alone—suits brought against Massachusetts in Virginia, against Ohio in Kentucky, and against South Dakota in both North Dakota and Minnesota—as well as a 2013 case brought against Connecticut in Texas. *Id.* at 9-10. Outside the tax context, amici point to suits against Ohio in Indiana, against North Dakota in Minnesota, against Rhode Island in Connecticut, and against Texas in New Mexico—each of which has been pending in the past two years alone. *Id.* at 10. The petition provides additional examples, as does the States' amicus brief in *Hyatt II*. Pet. 27-28; States Br. 23-26,

Franchise Tax Bd. of Cal. v. *Hyatt*, No. 14-1175 (U.S. Sept. 10, 2015). Indeed, this petition is not even the only one currently asking the Court to reconsider *Hall*. *See* Pet. for Cert., *Nevada Dep't of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018). And, of course, the very fact that 45 States have joined California in asking the Court to overrule *Hall*—including Nevada, whose courts exercised jurisdiction in this case—suggests that this is an important and recurring issue.

Hyatt's contention (at 12) that petitioner and amici have identified "little burden on state governments from such litigation" also rings hollow. In fact, petitioner and amici have explained the serious harms caused by suits brought under *Hall*. Such suits impose on defendant States the financial and administrative costs of litigation and the cost of any judgment. This case—having dragged on for 20 years, through a four-month trial, with costs in the millions of dollars, Pet. App. 11a-12a—well illustrates the kinds of "staggering burdens," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), that litigation of this nature can create. *See* Pet. 21. Aside from their pecuniary burdens, suits under *Hall* demean defendant States' dignity by forcing them to justify their core sovereign functions to the courts and juries of another State, rather than to their own citizens in the exercise of self-government. *See id.*; States Br. 2. And they permit state courts to inject themselves into the sovereign functions of other States, interfering with or even altering the defendant State's policies. *See* Pet. 27-28 (because of a case brought in California's courts, Nevada was forced to alter its policy of providing bus vouchers to indigent patients discharged from state-run medical facilities); States Br. 6-7. In some cases, such as in the tax context, suits brought under *Hall* can also undermine the administrative processes

States have created as conditions for waiving sovereign immunity. States Br. 3-7. Those are exactly the types of burdens that sovereign immunity is meant to prevent. *See, e.g.*, *Alden*, 527 U.S. at 750.[1]

2. Hyatt contends (at 12, 17) that the voluntary doctrine of comity is an adequate substitute for sovereign immunity, but this case—which, ironically, Hyatt cites as an example—exposes the fallacy of that argument. Petitioner has been litigating this case for more than 20 years and, unless this Court intervenes, faces a monetary judgment to be entered on remand from the decision below. Even though that judgment would be substantially less than the initial award imposed by the trial court, it remains significant. And the monetary judgment is dwarfed by the time and money that petitioner has spent litigating this case, to say nothing of the distraction from its core tax functions and the harm to California's dignity from being haled before a Nevada court and jury.

Moreover, even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cites (at 12), the defendant—an Arizona governmental trust—had to litigate for

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[1] Professor Stempel's contrary conclusion that "'the empirical burden of such litigation is far from clear and hardly seems oppressive,'" cited by Hyatt (at 12), is unsupported and should be taken with a healthy dose of skepticism given that Professor Stempel was a retained expert for Hyatt in this case. *See* Stempel, Hyatt v. Franchise Tax Board of California: *Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities, though not the one-year statute of limitations that Arizona courts would have applied. Comity is no substitute for a clear rule of sovereign immunity, which should allow a defendant State to terminate litigation quickly and at the initial stage of a case, without incurring the extraordinary costs seen in this case and in *Sam*.

3. Hyatt also contends (at 17) that the States could enter into an agreement to provide immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely, the United States Constitution. Interstate compacts "can take decades, or longer, to hammer out," Multistate Tax Comm'n Br. 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

II. *HALL* WAS WRONGLY DECIDED, AND STARE DECISIS IS NO REASON TO PRESERVE IT

Hyatt devotes most of his brief in opposition to the merits of the question presented, arguing that *Hall* was correctly decided and that stare decisis counsels against overruling it. Those arguments are properly considered at the merits stage, not in deciding whether to grant certiorari. In any event, both are meritless.

A. Hyatt's Defense Of *Hall* Relies On A Selective And Incorrect Reading Of Precedents

1. Hyatt attempts to defend *Hall* by recapitulating *Hall*'s reasoning—particularly its reliance on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch)

116 (1812). That reasoning is as unpersuasive now as it was in *Hall*.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation's courts possess "exclusive and absolute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

Hyatt relies on *The Schooner Exchange* for the supposedly "basic and unassailable premise[]" (Opp. 14) that States, like sovereign nations, cannot assert sovereign immunity in the courts of other sovereigns. But that premise is far from "basic and unassailable"; to the contrary, it conflicts with the view that prevailed from the Founding until *Hall*.

As the petition explains (at 11-12), it was widely understood in the Founding era that the States enjoyed sovereign immunity from suit in each other's courts. For example, when a Pennsylvania court exercised jurisdiction over property belonging to Virginia, *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), the episode "raised such concerns throughout the

States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). The strength of national consensus on this issue became even clearer with the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), that culminated in the Eleventh Amendment—which showed that the States, horrified at the notion of being subjected to suit in federal court, must even more strongly "have reprehended the notion of ... being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

In the decades that followed, numerous decisions of this Court expressed the view that States were not, as Hyatt suggests, free to entertain suits against sister States. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added); *see also Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961); *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883); Pet. 14 n.2. State courts shared that understanding. *See, e.g.*, *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929). None of those decisions so much as mentioned *The Schooner Exchange*.

Hyatt makes no attempt to reconcile his reliance on *The Schooner Exchange* with this long history, or even to address it at all.

Hyatt does cite *Alden* for the proposition that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." 527 U.S. at 738; *see* Opp. 15. But that is simply the *Alden* Court's characterization of what *Hall* held;

Alden did not reaffirm *Hall*'s erroneous reasoning. Nor is Hyatt correct to say (at 13), presumably with *Alden* in mind, that overruling *Hall* would require this Court to "revisit the myriad precedents that depend upon it." *Alden* does not "depend upon" *Hall* any more than it reaffirms *Hall*'s erroneous reasoning. Rather, the *Alden* Court felt the need to distinguish *Hall* (while noting that *Hall* in some respects could be read as "consistent with, and even support[ing]," the holding the Court ultimately reached). And Hyatt does not identify any other precedents of the supposed "myriad" that "depend upon" *Hall*.

2. Aside from his reliance on *The Schooner Exchange*, Hyatt invokes (at 16) two further elements of *Hall*'s erroneous reasoning: first, that the immunity of States in each other's courts was not discussed during the drafting or ratification of the Constitution; and second, that the constitutional text does not explicitly recognize interstate sovereign immunity.

As the petition explains, those premises were flawed at the time of *Hall* and have grown only weaker since. As the *Hall* dissenters recognized, the "only reason" interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting); *see also* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 253, 263; Pet. 12. And this Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see* Pet. 14-15 (collecting others). Hyatt offers no response. Nor does he address *Hall*'s inconsistency with the constitutional values of dignity and self-

government that are protected by state sovereign immunity, as this Court's subsequent decisions have made clear. *See, e.g.*, *Alden*, 527 U.S. at 715, 750; Pet. 16-18. Those values are particularly acute in the context of suits, like this one, that challenge a State's exercise of the core sovereign function of taxation. Pet. 18.

B. Stare Decisis Considerations Are At Their Weakest Here

As the petition explains (at 19-22), moreover, stare decisis considerations do not stand in the way of overruling *Hall*, and certainly provide no basis for refusing to consider doing so. "*Stare decisis* is not an inexorable command" and is weakest in a case—such as this one—involving a constitutional issue that has not engendered reliance interests. *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In such a case, stare decisis cannot justify adherence to a decision that is "unworkable or ... badly reasoned," *id.*, as *Hall* was.

Citing this Court's decisions in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), Hyatt notes that stare decisis "is of fundamental importance to the rule of law." Opp. 11 (internal quotation marks omitted) (quoting *Patterson*, 491 U.S. at 172); *see* Opp. 17. That is certainly true. But the Court has also explained that stare decisis has "special force in the area of statutory interpretation"—at issue in both *Patterson* and *Kimble*—because, "unlike in the context of constitutional interpretation, ... Congress remains free to alter" this Court's rulings. *Patterson*, 491 U.S. at 172-173; *see also Kimble*, 135 S. Ct. at 2409. In constitutional cases, like this one, stare decisis carries less force because "'correction through legislative

action is practically impossible.'" *Payne*, 501 U.S. at 828.

Stare decisis also carries less force in this context because, as a constitutional decision regarding sovereign immunity—a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*Hall* has not engendered reliance interests. Pet. 22. That too distinguishes this case from *Kimble* and *Patterson*, which involved the kinds of "property and contract" interests for which reliance is a serious concern and "[c]onsiderations in favor of *stare decisis* are at their acme," *Payne*, 501 U.S. at 828. *See Kimble*, 135 S. Ct. at 2410; *Patterson*, 491 U.S. at 174.

In any event, as the petition explains (at 11-13, 19-22), this case presents all of the considerations that justify overcoming stare decisis. *Hall*'s reasoning is inconsistent with the Framing-era conception of sovereign immunity and the history of the Eleventh Amendment, and thus was "unsound in principle" when it was decided, *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). And cases since *Hall* have "left [it] behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). *See supra* pp. 8-9; Pet. 13-18.

The petition also explains (at 21-22) that *Hall* has proven "unworkable," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). *Hall* denies States the "dignity and respect" that sovereign immunity is "designed to protect," *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997); interferes with their ability to govern by diverting their resources to defend suits across the country; subjects them to bias in other States' courts; and leaves them in the dark as to what protection—if any—they

will receive when they are haled into another State's courts. The considerations that favor overruling such a misguided precedent far outweigh those that favor retaining it simply for the sake of consistency.

CONCLUSION

The petition for a writ of certiorari should be granted.

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On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF INDIANA AND 44 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioner. The *amici* States have a strong interest in protecting their sovereign immunity by overturning *Nevada v. Hall*, 440 U.S. 410 (1979). *Hall* is—and always has been—irreconcilable with the Court's larger body of sovereign immunity decisions, and the *amici* States support certiorari in any case that presents an appropriate vehicle for a full-strength Court to overturn it.

SUMMARY OF THE ARGUMENT

Since the Court deadlocked over the issue the last time this case was before it, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016), the need to overturn *Hall* has only grown. As discussed in detail below, States all too frequently find themselves the targets of private-plaintiff lawsuits filed in the courts of other States. Such cases not only insult the sovereign dignity of defendant States, but also pose the real

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Amici States' intention to file this brief at least 10 days prior to the due date of this brief.

risk of exposing States to judgments unrestrained by any concern for local fiscal impact. And where, as here, the State is haled into another State's courts based on how it has exercised its authority to conduct tax audits, the interest in preserving immunity as an attribute of State sovereignty is particularly acute.

REASONS FOR GRANTING THE PETITION

I. That *Hall* Enables Another State's Courts To Review a State Tax Audit Demonstrates the Severity of the Insult to Sovereignty

Every case brought against one State in a court of another State undermines the defendant State's sovereignty, both in terms of the insult to sovereign dignity and in terms of the required expenditure of sovereign resources to litigate the matter. *See Alden v. Maine*, 527 U.S. 706, 751 (1999). States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made." *Id.* Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). In all cases, a limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.*

Yet the Court has also recognized that vitiating sovereign immunity when the power to tax is at stake is particularly harmful, as "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty." *Franchise Tax Bd. of Cal. v. Hyatt*

(*Hyatt I*), 538 U.S. 488, 498 (2003). "[T]axes," the Court has recognized, "are the life-blood of government, and their prompt and certain availability an imperious need." *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 523 (1984) (quoting *Bull v. United States*, 295 U.S. 247, 259–60 (1935)).

The taxing power of States is so important that Congress has limited the ability of the federal judiciary to restrain it. The Tax Injunction Act of 1937 prevents federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The purpose of the Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). It "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Such a substantive limit on the power of federal courts demonstrates the core status of the taxing power to the States.

For their part, States often limit the processes their own taxpayers may use to challenge assessments and audits. Of the forty-three States that have some form of income tax, many have an administrative review process that taxpayers must complete before seeking judicial review of an audit or assessment. *See, e.g.*, Ind. Code § 6-8.1-5-1. Many States require a

final administrative decision to be appealed to a special tax court, rather than a court of general jurisdiction. *See, e.g.*, Ind. Code § 33-26-3-1; Ala. Code § 40-29-90. *See generally* All St. Tax Guide (RIA). For sales and use taxes, similarly, many States require administrative review before challenging an audit or assessment in State court. In Indiana, for example, a taxpayer must first file a protest with Indiana Department of Revenue before appealing to the Indiana Tax Court. Ind. Code § 6-8.1-5-1. In Illinois, to take another example, the taxpayer has the option of either filing a protest with the Department of Revenue, 35 Ill. Comp. Stat. 120/5, paying the tax and then filing a claim for a credit with the Department, 35 Ill. Comp. Stat. 735/3-2, or paying the tax under protest and then filing an action in state court, 30 Ill. Comp. Stat. 230/1. *See generally* Am. Bar Ass'n, *Sales & Use Tax Deskbook* (30th ed. 2016–17). *See also* Am. Bar Ass'n, *Property Tax Deskbook* (22nd ed. 2017) (showing specialized administrative review procedures for property tax assessments).

Channeling tax claims into administrative review or specialized courts is one way States safeguard core taxation authority. Accordingly, in Nevada and California—the two States with direct ties to this case—bypassing administrative review and immediately seeking judicial review of an audit (or the tactics used during an audit) is not permitted. In Nevada, a taxpayer must complete administrative review *and* pay the tax bill before seeking judicial review of an audit. Nev. Rev. Stat. § 360.395. In California, a taxpayer may either file an appeal with the Office of Tax Appeals (without paying the underlying tax) or may first

pay the tax and then file a claim with the Franchise Tax Board for a refund. *See* Cal. Gov't Code § 15677; Cal. Rev. & Tax. Code § 19381. If the Franchise Tax Board denies the claim or does not act within six months, the taxpayer may file a suit for a refund in the Superior Court. Cal. Rev. & Tax. Code § 19381. By suing California's tax authorities in Nevada courts, however, Hyatt has bypassed these procedures.

Similarly, in Virginia, where Massachusetts has been sued in a court of general jurisdiction by a taxpayer seeking relief from Massachusetts sales taxes, a taxpayer applying for relief from a *Virginia* sales tax assessment must first apply to the Tax Commissioner. Va. Code Ann. § 58.1-1821. Only after the Tax Commissioner issues a final determination may the taxpayer apply to the appropriate circuit court for judicial review of the determination. *Id.* § 58.1-3703.1.7a. Meanwhile, when its sales tax assessments are challenged at home, Massachusetts enjoys the protection of a system that requires taxpayers to (1) file for abatement and (2) seek review by the Appellate Tax Board. Frank J. Scharaffa, *Massachusetts Taxation and DOR Practice A Guide to Collections, Audits, Abatements, and Appeals* § 14.2 (4th ed. 2018).

Kentucky, whose courts of general jurisdiction have provided the forum for a suit challenging an Ohio corporate tax assessment, requires its own taxpayers in similar circumstances to exhaust administrative remedies through the newly restructured Ken-

tucky Claims Commission before seeking judicial relief. *See* Ky. Rev. Stat. Ann. § 49.220; *Smallwood v. River Valley Behavioral Health, Inc.*, No. 2007-CA-000728-MR, 2008 WL 1108519, at *1 (Ky. Ct. App. April 11, 2008). And Ohio taxpayers in similar situations must, after receiving a final determination of the tax commissioner, proceed through the board of tax appeals (or, in limited instances, the court of common pleas) before seeking judicial relief. Ohio Rev. Code Ann. § 5717.02.

In North Dakota, where South Dakota has been sued over a sales tax audit in a State trial court, all challenges to *North Dakota* audits must first be heard by the Tax Commissioner. N.D. Cent. Code § 57-01-11. And in Minnesota—where South Dakota also has been sued over a sales tax audit—taxpayers must challenge *Minnesota* tax audits either through the Minnesota Department of Revenue or to the Minnesota Tax Court. Minn. Stat. Ann. §§ 270C.35, 271.09.

Hall undermines these administrative processes and the federal Tax Injunction Act by providing an end-run for plaintiffs around a State's tax enforcement system without requiring plaintiffs to abide by the carefully crafted administrative procedures established by the taxing State. *Hall* also undermines the exercise of core State functions such as taxation, assessment, and audit by permitting a court from another State to overrule a State's policymaking and enforcement decisions. 440 U.S. at 425–27. By exercising jurisdiction over the taxation authority of another State, a State court may make decisions that effectively determine what revenue goals the defendant

State should pursue and how it should pursue them. Such lawsuits "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 750–51.

Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, treasuries, and policy priorities. This case has already inspired other lawsuits in Nevada courts against FTB, which may force FTB to alter its enforcement policies. *See, e.g.*, Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014).

To be sure, the Court in *Hyatt I* struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." 538 U.S. at 498. But that only means that the Court should not create different standards for different types of claims. The point remains that this case demonstrates the degree to which *Hall* opened the door not only to suits that seek compensation for other States' seemingly ordinary torts, but also for suits challenging other States' core policy and enforcement determinations that the courts of the forum State may find objectionable.

II. *Hall* Continues To Enable Widespread State Judicial Interference with the Sovereign Functions of Other States

This case is no outlier. As a result of *Hall*, State courts commonly exercise jurisdiction over officials and agencies of other States—particularly in cases directly implicating the defendant State's sovereign power to establish and enforce policy. Recurring State judicial interference with sister State core functions is the principal legacy of *Hall*'s unsound destruction of interstate sovereign immunity.

As West Virginia's cert-stage multistate amicus brief apprised the Court three years ago in this case, in the wake of *Hall*, state courts have exercised jurisdiction over other States in cases involving the revocation of a degree by a state university, *Faulkner v. Univ. of Tennessee*, 627 So. 2d 362 (Ala. 1992), the firing of a state auditor, *McDonnell v. Illinois*, 725 A.2d 126 (N.J. Super. Ct. App. Div. 1999), *aff'd per curiam*, 748 A.2d 1105 (N.J. 2000), and the treatment of indigent patients of a state-run psychiatric hospital, *Nev. v. Superior Court of Cal.*, 135 S. Ct. 2937 (2015). Indeed, as noted above, this is not even the only case where a Nevada resident has sued the FTB in a Nevada court. Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014).

For its part, the State of Nevada—the very State whose courts chose to exercise jurisdiction in this case—both joined other States urging the Court to take this case to revisit *Hall* the last time around, Brief of Amici Curiae State of West Virginia and 39

Other States in Support of Petitioner, *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016) (No. 14-1175), *and* filed its own cert. petition asking the Court to overrule *Hall* in *Nevada v. Superior Court of California*, which the Court denied. 135 S. Ct. 2937 (2015).

This Term, it is déjà vu all over again. Nevada has both joined this brief and just recently filed a petition for writ of certiorari in yet *another* case where it has been sued in California state court. Petition for Writ of Certiorari, *Nevada Dep't of Wildlife v. Smith*, No. 17-1348 (Mar. 21, 2018).

Alas, the fate of *Hall* is not simply a matter of whether the courts of Nevada and California may continue to launch summonses over the border at one another's State agencies. In recent years, many other State governments also have found themselves on the receiving end of process issued by the court of another State.

As alluded to above, at least five other tax cases have been brought against one State in a court of another State. Massachusetts is currently being sued in Virginia state court over a recently promulgated sales and use tax regulation. The suit seeks to invalidate the regulation as a violation of both the Dormant Commerce Clause and a rarely-invoked fedral statute, the Internet Tax Freedom Act. Mass. Comm'r of Revenue's Mem. of Points and Auths. in Supp. of his Mot. to Dismiss for Lack of Personal Jurisdiction at 4, *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018). Similarly, Ohio has an

appeal pending in the Kentucky Court of Appeals concerning a section 1983 claim over a corporate activity tax assessment. Notice of Appeal of Defs./Appellants State of Ohio & Joseph W. Testa, Tax Comm'r of Ohio at 1, *Great Lakes Minerals, LLC v. Ohio*, No. 17-CI-00311 (Ky. Ct. App. Mar. 16, 2018). And South Dakota has been sued in both North Dakota *and* Minnesota over a tax audit. Compl., *Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018); Compl., *Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18-80 (Minn. D. Ct. Mar. 7, 2018). Finally, Connecticut was sued in Texas state court by a Connecticut taxpayer seeking declaratory and injunctive relief against the collection of Connecticut taxes, along with damages. Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13-08568 (Tex. D. Ct. Aug. 6, 2013).

Outside the tax arena, Ohio also is a defendant in an Indiana state court case arising out of a motor vehicle collision. Order Denying Summ. J., *Chilton v. Ohio Dept. of Transp.*, No. 15D01-1404-CT-019 (Ind. Sup. Ct. Dec. 19, 2016). North Dakota is currently defending against a contract dispute in Minnesota state court. Compl., *Rosewood Hospitality, LLC v. N.D. Dept. of Soc. Servs.*, No. 62-CO-18-538 (Minn. D. Ct. Feb. 27, 2018). Rhode Island has a family law case in Connecticut state court. Compl., *Reale v. R.I.*, No. WWM-CV18-5008257-S (Conn. Sup. Ct. Nov. 17, 2017). And Texas recently defended a medical malpractice case in New Mexico state court. *Montano v. Frezza*, 339 P.3d 700 (N.M. 2017).

As these cases make clear, *Hall* has had a sustained nationwide impact, affecting many States in many legal contexts. The widespread practice of haling State agencies into the courts of their sister States is an insult to the most fundamental notions of State sovereignty. The Court should grant certiorari to reconsider *Hall* in light of this legacy.

III. *Hall* Is Fundamentally Contrary to the Remainder of Sovereign Immunity Doctrine and Should Be Overruled

Nevada v. Hall rests on the flawed premise that State courts may assert jurisdiction over their sister States unless there is something in the Constitution that expressly limits such jurisdiction. 440 U.S. 410, 421 (1979). Because the Court found nothing in Article III or in the Eleventh Amendment that explicitly forbade such jurisdiction, it held that lawsuits against a State in the courts of another State do not offend sovereign immunity. *Id.* But later decisions from the Court reject that premise.

As the Court recognized in *Hall* itself, the Framers assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.* at 419. Stated more directly, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985). But while *Hall* took that underlying sentiment to mean

that an expectation of comity was sufficient protection against interstate jurisdiction, the more appropriate inference is that the inquiry for this Court should be whether anything in the Constitution *allows* jurisdiction of State courts over their sister States—not whether anything *forbids* it.

Sovereign immunity cases since *Hall* have established what *Hall* rejected—sovereign immunity is derived from the history and structure of the Constitution and is antecedent to the text of both Article III and the Eleventh Amendment. *Cf. Hall*, 440 U.S. at 426–27. In *Seminole Tribe of Florida v. Florida*, the Court, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), said that "we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." 517 U.S. 44, 69 (1996) (internal citations omitted). The very next year, in *Idaho v. Coeur d'Alene Tribe of Idaho* the Court again emphasized that the "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment." 521 U.S. 261, 267 (1997).

Later, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court elaborated on this principle: "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715. The Eleventh Amendment was adopted "not to change" the Constitution "but to restore the original constitutional design." *Id.* at 722. For this reason, "the sovereign immunity of the States neither derives from, nor is limited by, the terms of

the Eleventh Amendment." *Id.* at 713; *see also Federal Maritime Comm'n v. S.C. State Ports Authority*, 535 U.S. 743, 753 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). Ultimately, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden*, 527 U.S. at 713.

Seminole Tribe, *Coeur d'Alene*, *Alden*, and *Federal Maritime Commission* represent a fundamental course correction in the law of sovereign immunity—one that respects constitutional history and structure in a way that several earlier decisions, including not only *Union Gas* but also *Hall*, did not. Yet *Hall* remains as a vestige of the discarded doctrine, one that starkly contradicts other governing sovereign immunity precedents. The Court should overturn it.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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No. 17-1299

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission (the Commission)[1] respectfully submits this brief in support of the petitioner, California Franchise Tax Board, asking the Court to grant certiorari to overturn *Nevada v. Hall*. The Commission, created in 1967 by the Multistate Tax Compact,[2] promotes interstate cooperation by, among other things, providing a forum for state tax administrators to draft uniform tax laws, conduct joint audits, and facilitate the settlement of unreported business taxes.[3]

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Counsel for both parties received timely notice of the *amicus*'s intent to file this brief and granted their consent to the filing thereof.

[2] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding the Compact).

[3] The Commission is made up of the tax agency heads of states that have adopted the Compact by statute. In addition to these sixteen compact members, thirty-three states are sovereignty or associate members. *Compact members* are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. *Sovereignty members* are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. *Associate Members* are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. Information on the

As this case demonstrates, *Hall's* derogation of state sovereign immunity threatens state tax enforcement and undermines interstate cooperation.

SUMMARY OF ARGUMENT

The petitioner argues *Hall's* cramped notion of state sovereign immunity conflicts with *Seminole Tribe v. Florida* and *Alden v. Maine*. We agree. *Hall* likened states to "independent and completely sovereign nations," dismissing the essential role immunity long played in our federal system as an "inference from the structure of our Constitution and nothing else." *Nevada v. Hall*, 440 U.S. 410, 417, 427 (1979).

True, the precise issue is not explicitly addressed in our Constitution's *text*. The inference to be drawn, however, is not from our Constitution's *structure*, but from the exacting imperative of its Full Faith and Credit Clause: A state must give conclusive effect to the judgment of a sister-state's court, even if it is based on contrary or conflicting law.

Because of *Hall*, this imperative now holds even when the defendant is the state itself. When a defendant state's immunity is subject to the discretion of its sister-state's court, the state is consequently subject to the sister-state's procedural and policy choices. This is a quantum of power no sovereign would willingly cede to another. *Hall's* denigration of the states' immunity, so consequential to the balance struck under our federal system, and maintained for

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Commission and its programs is available on its website: http://www.mtc.gov/Home.aspx.

two centuries, ought not be based, as it was, solely on the lack of explicit Constitutional text, and nothing else.

Cases since *Hall*, including this one, demonstrate the difficulties created by its aberrant holding, even where traditional tort claims are at issue. But the potential for mischief is perhaps greatest in the area of state taxes. *Hall* opens a path for plaintiffs to use out-of-state forums to collaterally attack tax enforcement efforts, alleging various claims and circumventing the specialized administrative processes established in every state to ensure that taxes are properly and timely collected, and that disputes are fairly resolved.

Hall's defenders do not deny this threat is real. Rather, they contend the proper solution is for states to enter into comprehensive reciprocal agreements to exercise comity, agreements that do not exist, in part, because for the first two centuries of the history of our Constitution, there was no need. But the problem with this solution is that the doctrine of comity itself makes such agreements more difficult, if not impossible, when, as in the tax area, the state policies compete. And, ironically, the compromises necessary to reach such agreements will likely be hampered by the very conflicts that *Hall* potentially creates.

ARGUMENT

I. Hall opens a path for putative taxpayers to disrupt state tax enforcement.

A. States have specialized administrative processes and procedures to resolve tax disputes while ensuring tax collection.

Federal and state governments have instituted specialized administrative processes for resolving tax matters through the explicit waiver of sovereign immunity. *U.S. v. Williams*, 514 U.S. 527, 531 (1995); *Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002). Governments depend on exhaustion of these administrative remedies to ensure that revenues are timely collected and that disputes, which are frequent, can be fairly resolved. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989); and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006). States, themselves, must follow these processes in order to obtain a final enforceable tax liability against a taxpayer. *See* CAL. REV. & TAX. CODE §§ 19044 and 21011.

Of course, a taxpayer cannot bring suit in state courts against the federal government, seeking to resolve a tax-related matter. 28 U.S.C. § 1346(a)(1). *See also P.C. Monday Tea Co. v. Milwaukee County Expressway Comm'n*, 139 N.W.2d 26, 29-30 (Wis. 1966)(holding that state courts lack such authority). The conflicts and difficulties this would cause are obvious.

This Court has long recognized the fundamental role that these specialized administrative processes play in tax enforcement, and thus, in funding state governments. Two years after *Hall*, the Court was faced with the question of whether federal courts could dismiss state-tax-related § 1983 claims where there was a failure to exhaust the taxing-state's administrative remedies. *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981). The majority in *McNary* concluded federal courts should exercise comity to dismiss such suits, observing that the doctrine of restraint "carried particular force, in suits challenging the constitutionality of state tax laws." *Id.* at 108 (internal citations omitted). The majority also noted: "In addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. As the Court recognized, maintenance of the suit would take up limited administrative resources, have a chilling effect on administrative actions, and lead to the inevitable suspension of collection efforts. *Id.* at 115.

In *McNary*, four justices disagreed that the exercise of comity was possible, noting the imperative set out in § 1983. But they nevertheless concurred in the judgment, concluding that § 1983 should be interpreted to allow federal courts to dismiss tax-related suits if the plaintiff had not properly exhausted state administrative processes. Critically, the concurrence also said this: "While the 'principle of comity' may be a source of judicial policy, *it is emphatically no source of judicial power to renounce jurisdiction.*" *Id.* at 119 (Brennan, J. concurring, emphasis added). We return to this issue in Section II.

B. There are significant incentives to sue a taxing state in an out-of-state court, even if the suit may not succeed.

As *McNary* recognized, putative taxpayers can obtain advantages by suing the taxing state in another forum, delaying, disrupting, or deterring administrative proceedings. Even if the taxing state initiates such proceedings—and indeed it may have no choice if tax liabilities are to be established within statutory guidelines and timelines—those proceedings can be undermined by the out-of-state suit. For example, the out-of-state suit gives the plaintiff a basis to resist informal requests for information or even subpoenas from the taxing state. The plaintiff may also petition the trial court, as Mr. Hyatt did here, to issue protective orders preventing the use of documents necessary for the tax proceeding.[4] Taxing-state officials and employees can be required to submit to depositions and document production. Moreover, some critical rules, such as statutes of limitation, have been held to be procedural. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-728 (1988); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006). *See also* Restatement (Second) of Conflict of Laws § 122 (1971).

Plaintiffs may also attempt to persuade the sister-state's court to disregard the taxing state's regulations and rulings as well as other public acts or doc-

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[4] *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002) (unpublished table decision), available at: http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=5165&csIID=5165&deLinkID=184207&sireDocumentNumber=02-05994.

uments, such as tax notices, assessments, etc., that would have substantial weight in the taxing state's own forum. If the court does so, that decision will typically be subject to review only under the most lenient of standards—abuse of discretion. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998)(holding that unlike the preclusive effect of a judgment, enforcement measures remain subject to the forum state's law); *Hyatt v. Franchise Tax Bd.*, 962 N.Y.S 2d 282 (N.Y. App. Div. 2013) (holding that California's administrative subpoena was not entitled to full faith and credit and that a court may decline, under the doctrine of comity, to enforce a subpoena unless it conforms to the forum state's rules). Nor would the eventual administrative ruling of an administrative forum, which is granted limited jurisdiction, be entitled to preclusive effect. *See Thomas v. Washington Gas Light Company*, 448 U.S. 261 (1980)(holding that Full Faith and Credit principles do not apply to administrative agency rulings in the same way they would apply to state court judgments). So even if the defendant state were to proceed with enforcement through an administrative proceeding, the ruling of the administrative tribunal might not be entitled to any effect in the out-of-state suit. This not an insignificant problem for the states. At least thirty-three states have specialized tax tribunals to hear tax disputes, separate from the state's courts of general jurisdiction.[5]

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[5] *See* AICPA Chart of States With and Without State Tax Tribunals (Current as of 2/3/2016), available at: https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf .

Given these incentives, therefore, we must expect such suits will occur, especially where the plaintiff has resources and the asserted tax liability is significant. Nor will potential obstacles to successful prosecution remove this incentive, since successful prosecution is not the goal. There have been, for instance, persistent attempts to sue state tax agencies in the federal courts of a taxing state, despite the doctrines of comity and abstention, and the jurisdictional bar imposed by the Tax Injunction Act.[6] *See id.* at 102; *Hibbs v. Winn*, 542 U.S. 88, 104 (2004); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Moreover, the incentive to bring suit in the courts of another state will be significantly greater. As discussed further below, when the forum is in another state, the plaintiff may assert claims under that state's law, which the court must consider. (This would also include the federal courts sitting in that state, where there is no jurisdictional bar.) Also, unlike the federal § 1983 claims under *McNary*, there is nothing in *Hall* or this Court's precedents that would require state or federal courts to recognize the need for exhaustion before such state-based claims can be brought.

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[6] 28 U.S.C. § 1341.

C. Conflict of law issues create special problems that can be exploited in the state tax area.

An out-of-state court in a suit against a defendant state must determine, under the rules for conflicts of law, whether to apply the substantive laws of the defendant or the forum state. The court must, therefore, have some understanding of the defendant state's law and its effect on the issues in suit. But unlike the law of torts, state tax policies differ, in part, as a result of a "healthy form of rivalry." *See Zobel v. Williams*, 457 U.S. 55, 67 (1982). Here, of course, California imposes an individual income tax, along with all of the concomitant substantive and procedural rules, while Nevada does not. This is the very kind of conflict in public policy that entitles Nevada courts to favor Nevada's own policy choices. Nor will the Nevada court's ruling necessarily affect its own administration of taxes.

If the court chooses to apply the defendant state's laws, there is no guarantee it will do so correctly. If it misconstrues that law, this does not implicate full faith and credit unless the mistake contradicts an established interpretation and is brought to the court's attention during the litigation. *See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) and *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914). Also, the defendant state's appellate courts will have no opportunity to review the court's application of its laws, creating the potential for persistent conflicts in interpretations that can be further exploited.

If, instead, the court chooses to apply the forum-state's law, it need not demonstrate that the forum state had the majority of the contacts with the issue. For example, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), this Court held a Minnesota court properly applied Minnesota law to a case involving an out-of-state accident and the death of an out-of-state resident, in part because the plaintiff (the decedent's wife) had moved to Minnesota after the accident. *Id.* at 318-319. Nor would the choice to apply the forum-state's law normally implicate the Full Faith and Credit Clause, *Id.* at 323 (Stevens, J. concurring), unless, as this Court has previously held, the court adopted a "policy of hostility" to the laws of the defendant state. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003). But, of course, such hostility is in the eye of the beholder. *See Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1286 (2016)(Roberts, C.J., dissenting).

Whichever law the court applies, its judgment will have preclusive effect for the issues litigated. A defendant state will not ordinarily be able to refuse to give effect to a judgment by another state's court, so long as the question of jurisdiction was fully and fairly litigated in that court. This Court has held, for example, that a federal court cannot consider whether a state court had jurisdiction to decide an issue if the state court itself fully considered the question of jurisdiction. *Durfee v. Duke*, 375 U.S. 106 (1963). *See also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691 (1982) (holding that North Carolina could not deny enforcement of an Indiana court judgment

even if it found the Indiana lacked subject-matter jurisdiction).

II. States cannot solve these problems through reciprocal agreements to exercise comity.

At best, comity imposes on an out-of-state court a difficult and complex decision. While the assertion of sovereign immunity simply requires the court to determine if the defendant-state agencies or officials are clothed in that immunity, no court can properly exercise comity to dismiss a suit without first considering other substantive issues including: the claims asserted, which state's law should apply, what that law requires, whether the forum state or the defendant state has waived immunity, etc. See, for example, the lengthy analysis of a federal magistrate sitting in Maine (in a non-tax matter), determining whether Maine's courts would exercise comity to dismiss claims against Connecticut and its officials. Amended Recommended Decision on Motion to Dismiss, *Hoffman v. Connecticut*, 2009 BL 376197, 3 (D. Me. Aug. 07, 2009).

The exercise of comity, therefore, is not a simple matter. It first requires the court consider issues which may be novel and complex. *See also Beard v. Viene*, 826 P.2d 990, 995 (Alaska 1992)(noting that comity is not the end, but the "beginning of the analytical process") *and City of Raton v. Arkansas River Power Auth.*, 600 F. Supp. 2d 1130 (D.N.M. 2008)(analyzing, at length, the factors that New Mexico courts would consider in determining whether to dismiss a suit under comity). Moreover, the types of issues that must be considered are substan-

tive in nature, requiring the defendant state to put on substantive defenses and arguments.

Further, unlike a decision concerning sovereign immunity, an order granting or denying dismissal under comity may not be subject to interlocutory appeal, as it was here, creating uncertainty as to whether resolution of claims may be stayed until that issue is resolved. *See Atl. Coast Conference v. Univ. of Maryland*, 751 S.E.2d 612, 616-617 (N.C. Ct. App. 2013)(deciding to grant interlocutory appeal while acknowledging that there was no right to such appeal under state law). Even where appeal is granted, this will only create more delays, as this case demonstrates.

Or take the case of *Schoeberlein v. Purdue University*. There, the question was whether a suit by an Illinois plaintiff against an Indiana university had been properly dismissed. The intermediate appellate court, in a split decision, reversed the dismissal. But the Illinois Supreme Court overturned that ruling, with one justice dissenting. The state's high court considered a number of factors for and against granting dismissal. It also noted that states' courts were split on the weighing of particular issues in favor or against dismissal. 544 N.E.2d 283 (Ill. 1989). *See also Biscoe v. Arlington Cnty.*, 738 F.2d 1352, 1360 (D.C. Cir. 1984)(describing how states faced with claims of immunity have resolved the issue by reference to the forum state's policy on comity, "not by rigid application of choice of law rules").

But even more critically, courts cannot exercise comity to grant dismissal if the forum state's interests

are sufficiently important. In other words, in the very cases where it matters, where the laws of the forum and defendant state conflict, the forum state's court will have no discretion. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1144 (N.Y. 2006)(reasoning that it is when there is "no material conflict" between forum-state and defendant-state policies that "our courts of course remain open to reasonable deference to the law of another jurisdiction . . .."). The doctrine of comity, as it is apparently recognized in a number of, if not most, states, requires that the court *not* dismiss a case where the state's important policies are implicated. *See Head v. Platte County*, 749 P.2d 6 (Kan. 1988)(holding that, in a suit against a sheriff in Missouri for acts committed in Missouri against a Kansas resident, "No state should give effect to the law of another on principles of comity when the effect would be deleterious to the public policy of the forum state.") Indeed, as the concurrence in *McNary* expressed, when lawmakers have indicated that their policies are important enough, comity provides no power to renounce jurisdiction. *McNary* at 119.

States' lawmakers, of course, may express a policy of restraint, or reciprocal restraint, but are unlikely to wish to do so through blanket policies covering all issues, even in a given area. Nor can such agreements provide a comprehensive solution, even on particular issues, unless virtually every state joins. Such cooperative efforts can take decades, or longer, to hammer out, and state lawmakers may be inclined to let state courts continue grappling with the issues in the hopes that such case-by-case analysis will provide answers. States cannot, therefore, be

faulted for failing to develop these comprehensive cooperative solutions, given they were unaware of the need until *Hall*. More critically, *Hall's* defenders can point to no evidence that the solution is practical or that states will adopt a "wise policy, as a matter of harmonious interstate relations." *Hall* at 426.

There is evidence, however, that states may seek to use *Hall* to promote their own competing tax policies, and that taxpayers may use it to pit states against each other. Take the case of *Crutchfield Corp. v. Christopher C. Harding, in his capacity as Massachusetts Commissioner of Revenue*, et al., No. CL17001145-00 (Va. Cir. Ct. Oct. 24, 2017). Virginia law now allows Virginia companies to file a constitutional challenge seeking a declaratory judgment against a government official of another state that asserts the company has sales and use tax collection obligations in the state.[7] Crutchfield Corp., an online vendor, filed a complaint in Virginia, where it is headquartered, against the Massachusetts revenue commissioner challenging the constitutionality and validity of the that state's law asserting a tax collection obligation. If the lesson states take from *Hall* is that they have the opportunity to project their policies onto their sister-sovereigns, this will inevitably

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[7] This law has been contentious since its inception; in its 2004 fiscal impact statement accompanying the change in law, the Virginia Department of Taxation questioned whether a declaratory judgment issued by a Virginia circuit court that prohibits an action — legal under the laws of another state — would interfere with the sovereignty of that other state. *See* Amy Hamilton, *Massachusetts Officials Say Crutchfield Can't Haul Them Into Virginia Court*, 87 STATE TAX NOTES 237 (Jan. 15, 2018).

undermine any cooperative solution, and may threaten other types of interstate cooperation, as well.

CONCLUSION

Hall disrupts our Constitution's long-established balance and threatens core state functions, such as tax enforcement. The only proffered solution—the reciprocal exercise of comity—cannot be achieved without state legislative action, and that will require a long, painstaking effort, with no guarantee of success. Nor will state competition or the conflicts that *Hall* creates make this process any easier. Rather, *Hall* is likely to undermine state cooperation. There is only one solution to the problems created by *Hall*. The decision must be overturned.

Respectfully submitted,

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No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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QUESTION PRESENTED

Whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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IN THE

Supreme Court of the United States

No. 17-1299

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR PETITIONER

INTRODUCTION

This case arises from a protracted dispute between the Franchise Tax Board of the State of California (FTB) and an aggrieved taxpayer named Gilbert P. Hyatt. More than two decades ago, the FTB audited Hyatt's income tax returns and found that he had moved to Nevada later than he had claimed, creating a tax deficiency. Not satisfied with challenging the FTB's findings through California's administrative processes, Hyatt brought this suit against the FTB in Nevada state court, alleging that the FTB had committed numerous torts in the course of auditing his tax returns. After more than ten years of pretrial litigation, including a trip to this Court, Hyatt's suit proceeded to a four-month trial. The Nevada jury awarded Hyatt

more than $138 million in compensatory damages and $250 million in punitive damages—yielding, with costs and interest, a total judgment approaching half a billion dollars.

After an additional decade's worth of appeals, including a second trip to this Court, the monetary judgment against the FTB has been whittled down. But the burdens this litigation has imposed on the FTB—an agency of the State of California that is supposed to spend its time performing one of California's core sovereign functions—remain extraordinary. The litigation has cost California taxpayers millions of dollars, and even after the various appeals, the FTB *still* faces a judgment of $100,000, with Hyatt likely to seek costs in a further proceeding that could itself spawn additional appeals.

The Framers would have been horrified by this spectacle. When the Constitution was ratified, and for nearly two centuries after, it was universally understood that States could not be sued by individuals, without their consent, in the courts of other States. Yet this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), interpreted the Constitution to permit exactly that unintended result, on the theory that the Constitution did not explicitly address States' immunity in the courts of other States.

This Court's subsequent decisions make clear that *Hall* was wrongly decided. Although the *Hall* majority believed that any constitutional principle of state sovereign immunity had to be explicitly located in the constitutional text, the Court has since repeatedly held that "the scope of the States' immunity from suit is demarcated not by the text ... alone but by fundamental postulates implicit in the constitutional design." *Alden*

v. *Maine*, 527 U.S. 706, 729 (1999). To discern those "fundamental postulates," the Court has held, one must examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726-727. The relevant question, then, is not whether the Constitution explicitly recognized interstate sovereign immunity—the question on which the *Hall* majority focused—but rather whether the Framers intended to abrogate the States' pre-ratification immunity from suit in the courts of other States. The historical record makes clear they did not. *Hall* also gave short shrift to the values protected by state sovereign immunity, including dignity and self-government, that are undermined by allowing States to be haled into the potentially hostile home-state courts of individual plaintiffs.

Although this Court is ordinarily and rightly reluctant to overrule its precedents, the considerations favoring stare decisis are at their weakest here. Not only does this case involve a constitutional rule rather than a statute, but it is a constitutional rule that does not govern primary conduct and that has therefore engendered no reliance interests. Unlike in most cases, even in most constitutional cases, there is no reason here for the Court to perpetuate an erroneous interpretation of the Constitution merely for the sake of consistency. Indeed, *Hall* is a doctrinal outlier, in deep tension not only with this Court's later statements about constitutional interpretation but also with the Court's recognition of state and tribal sovereign immunity in numerous other contexts. The Court should overrule *Hall* and restore interstate sovereign immunity to its intended place in our constitutional structure.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (Pet. App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (Pet. App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (Pet. App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (Pet. App. 139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. Pet. App. 1a. The petition for certiorari was timely filed on March 12, 2018 and granted on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt resided in California for decades and earned hundreds of millions of dollars from technology patents he developed in California. Pet. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a resident of Nevada (which has no personal income tax), on October 1, 1991, shortly before he received substantial licensing fees. 538 U.S. at 490-491.

Petitioner, the Franchise Tax Board of the State of California, is the agency responsible for assessing personal income tax in California. In 1993, the FTB became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. Pet. App. 5a. The FTB therefore commenced an audit of Hyatt's 1991 return. *Id.* The audit determined that Hyatt did not move to Nevada until April 1992 and remained a California resident until that time. Pet. App. 7a. The FTB accordingly found that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because the FTB determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, it also opened an audit for that year, which concluded that Hyatt owed an additional $6 million in taxes and interest plus further penalties. Pet. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those determinations have consumed two decades. The California State Board of Equalization, which until recently heard administrative appeals from the FTB's determinations, affirmed the FTB's assessment of taxes for the 1991 tax year but sustained Hyatt's appeals for 1992. *See* Minutes of the State Bd. of Equalization (Aug. 29, 2017), https://tinyurl.com/yb3lhhcq. Those decisions remain under review by the Office of Tax Appeals, which assumed the Board of Equalization's appellate function.[1] The U.S. Court of Appeals for the Ninth Circuit recently affirmed the dismissal of a lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, seek-

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[1] *See* Taxpayer Transparency and Fairness Act, 2017 Cal. Legis. Serv. ch. 16 (A.B. 102) (West).

ing to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as the administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed various torts in the course of auditing his tax returns: negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Pet. App. 8a. Hyatt sought compensatory and punitive damages, as well as a declaratory judgment that he had resided in Nevada during the periods relevant to the FTB's audits. Pet. App. 3a, 8a.

The parties engaged in a long series of discovery battles, ranging from disagreements over the FTB's invocation of the deliberative-process privilege to challenges over the trial court's protective order. Pet. App. 147a-148a. The parties pressed their arguments before a discovery commissioner, the trial court, and, ultimately, the Nevada Supreme Court, which performed a document-by-document assessment to resolve the parties' disputes. Pet. App. 142a, 147a-148a.

The parties also engaged in extensive motion practice. The FTB sought summary judgment on multiple grounds, *see* Pet. App. 9a-10a, including that it was entitled to immunity from suit in Nevada as it would be in California, Pet. App. 142a. Under California law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application

of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Nevada courts were required to grant it the same immunity under the Full Faith and Credit Clause and under principles of sovereign immunity and comity. *Hyatt I*, 538 U.S. at 491-492. The trial court denied that motion. *Id.* at 492.

The FTB then petitioned the Nevada Supreme Court for a writ of mandamus, arguing that it was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected that claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court had held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. Pet. App. 144a & n.12. The Nevada Supreme Court then ruled that the "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. Pet. App. 10a.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that it would have received in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have had under California law. *Hyatt I*, 538 U.S. at 496-497.

The Court noted that, in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Although *Hall*—which involved tort damages flowing from a traffic accident in California be-

tween a Nevada state employee and residents of California—had left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, the Court in *Hyatt I* declined to draw such a distinction, *see* 538 U.S. at 497-499.

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties spent the next half decade engaged in extensive discovery and pretrial proceedings in state court. During that time, the parties filed thousands of pages of briefing on challenges to the scope of discovery, the appropriateness of in camera review, and other issues. In addition, the parties took 155 depositions and exchanged more than 168,000 documents.[2]

Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. Pet. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $85 million in damages for emotional distress, $52 million in damages for invasion of privacy, $1 million in damages for fraud, and $250 million in punitive damages. *Id.* The trial court later added $102 million in prejudgment interest, and after appointing a special master to rule on Hyatt's motion for costs—a process that required an additional fifteen months of discovery and even more motion practice—the trial court tacked on an additional $2.5 million to

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[2] *See* Appellants' Br. 26 n.22, *Franchise Tax Board* v. *Hyatt*, No. 53264 (Nev. Aug. 7, 2009), 2009 NV S. Ct. Briefs LEXIS 153.

Hyatt's award, Pet. App. 11a-12a. In total, the judgment against the FTB exceeded $490 million.

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). The court held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, but it affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the $50,000 statutory damages cap that Nevada law creates for Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. The court did, however, conclude as a matter of comity that the FTB was immune from punitive damages (as Nevada agencies are). *Id.* at 154. Because of evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016).

On the first question, the Court held that the Nevada Supreme Court had erred. *Hyatt II*, 136 S. Ct. at 1279. The Court divided equally on whether *Hall* should be overruled. *Id.*

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. Consistent with this Court's opinion, the Nevada Supreme Court instructed the trial court to enter a damages award for fraud within the statutory cap of $50,000. Pet. App. 107a. The court also held—in a reversal of its prior decision—that a new trial on the amount of damages for intentional infliction of emotional distress was no longer required, because the evidence at trial supported damages on that claim up to the $50,000 cap. Pet. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming "harmless" evidentiary errors it had previously determined to be prejudicial. *Id.* The court also remanded for consideration of costs. Pet. App. 124a-125a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, Pet. App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, Pet. App. 3a n.1, 41a, 56a.

SUMMARY OF ARGUMENT

I. *Hall* was wrongly decided. This Court's subsequent precedents make that clear in two ways.

First, whereas the *Hall* majority asked whether the Constitution expressly codified interstate sovereign immunity, this Court has since recognized that is the wrong question. The States retain the degree of sovereign immunity they enjoyed *before* the ratification of the Constitution, unless the Constitution *abrogates* their immunity. The relevant question, then, is whether States enjoyed immunity in each other's courts be-

fore the ratification of the Constitution—and, if so, whether the Framers intended to alter that state of affairs and allow States to be sued in other States' courts.

The historical record shows beyond doubt that the States *did* enjoy immunity in each other's courts in the pre-ratification era and that the Framers had no intention of abrogating that immunity. Rather, participants on all sides of the ratification debates—in the course of discussing whether Article III allowed States to be sued in the new federal courts—assumed without hesitation that States could not be sued in other States' courts. That understanding was confirmed by the outraged reaction to this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), allowing States to be sued in the neutral federal courts—a reaction that would have made little sense had anyone thought States could be sued in the potentially more hostile courts of other States. And the Framing-era consensus was further confirmed by decisions of this Court and state courts for nearly two centuries preceding *Hall*.

Hyatt has argued that in the Framing era, sovereigns were understood to possess enforceable immunity only in their own courts, not in the courts of other sovereigns. He bases that view on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which dealt with one nation's amenability to suit in the courts of another nation. But the relevant holding of *The Schooner Exchange*—that a forum nation may choose whether to recognize another nation's sovereign immunity in its courts—says nothing about whether states in a federal union are required to recognize each other's sovereign immunity in their courts. Rather, it reflects the absence of any supranational tribunal that could *force* one nation to respect another's sovereign immunity. The Constitution, by contrast, created a tri-

bunal—this Court—with the power to require one State to respect another's sovereign immunity. *The Schooner Exchange* thus sheds no light on the question presented here.

Second, *Hall* gave little consideration to the constitutional values that are protected by sovereign immunity. As articulated in this Court's subsequent decisions, those values, including States' dignity interests and their citizens' interests in self-government, are inconsistent with the holding of *Hall*. This suit—in which a California state agency has been subjected to astonishing burdens for two decades, and in which a Nevada judge and jury have passed judgment on California's conduct of one of its core sovereign functions—exemplifies why *Hall* cannot be squared with the values the Court has recognized in later decisions.

II. Although this Court is ordinarily and rightly loath to overrule its precedents, the presumption in favor of stare decisis should be overcome here for several reasons.

First, *Hall* is a poorly reasoned decision that is inconsistent with this Court's subsequent precedents in numerous respects. In addition to *Hall*'s inconsistency with the Court's subsequent statements about constitutional interpretation and the values protected by sovereign immunity, *Hall* stands in tension with numerous decisions in which this Court has recognized States' sovereign immunity in forums less potentially hostile to their sovereignty than state courts are to the interests of other States. Since *Hall*, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court; that state sovereign immunity extends to federal agency adjudications; and that

States are immune from suit on federal claims in the States' *own* courts. The Court has also held that Indian Tribes are immune from suit in state courts, even suits arising from a Tribe's commercial activities. *Hall* is an extreme outlier in the Court's sovereign immunity jurisprudence.

The Court has recognized that, when one of its prior decisions has come to stand out as an outlier, overruling that decision can promote rather than undermine the consistency of this Court's jurisprudence. That is the case here. As a jurisprudential anomaly, *Hall* also has not given rise to a broader line of precedents that would have to be overruled along with it.

Second, the considerations favoring stare decisis are at their lowest ebb here. *Hall* is a constitutional decision, not a statutory one. And because *Hall* addresses a question of sovereign immunity, which does not affect primary conduct, it has given rise to no reliance interests that would be disturbed by overruling it.

Third, *Hall* has had significant harmful effects. This case, for example, has cost the taxpayers of California millions of dollars and has put the State's tax-collection agency through two decades' worth of distractions from its primary mission—a core sovereign function. It has also encouraged copycat complaints by other plaintiffs outside California. And it is just one of many cases in which States have been haled into other States' courts without their consent, often in circumstances presenting serious threats to their dignity and self-government interests. Neither the doctrine of comity nor the possibility of an interstate compact can adequately mitigate those harms.

ARGUMENT

Hall conflicts with the Framing-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that state sovereign immunity is inherent in the federal structure of the Union and protects the dignity of the States and the right of the people of the States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should be overruled.

I. States Are Constitutionally Immune From Suit In Each Other's Courts

Nevada v. *Hall* arose from a collision in which California residents were injured by a car owned by the State of Nevada, which was being driven by an employee of the University of Nevada on official state business. 440 U.S. 410, 411 (1979). The California residents filed suit in California against the State of Nevada and the university, as well as the driver's estate. *Id.* at 411-412. A California jury awarded the plaintiffs more than $1 million. *Id.* at 413. The State of Nevada and the university petitioned for certiorari, arguing that they were immune from suit in California's courts. This Court held, however, that constitutional principles of sovereign immunity did not preclude one State from being haled into the courts of another against its will. *See id.* at 426-427.

The Court acknowledged that sovereign immunity "[u]nquestionably ... was a matter of importance in the early days of independence." 440 U.S. at 418. It recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the new federal courts. *Id.* And it observed that the debates over ratification, as well as later deci-

sions of this Court, reflected "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. It reasoned that, because the "need for constitutional protection against" the "contingency" of a state defendant's being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. And it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court thus determined that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, the Court explained that a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that flows not from "an express provision of the Constitution" but rather from "a guarantee that is implied as an essential component of federalism." 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, in the

dissenters' view, was that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." 440 U.S. at 431 (Blackmun, J., dissenting). He explained that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist, joined by Chief Justice Burger, likewise wrote that "when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." 440 U.S. at 433 (Rehnquist, J., dissenting). "The tacit postulates yielded by that ordering," Justice Rehnquist wrote, "are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." *Id.* He found support for that view in no less foundational a precedent than *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court recognized the doctrine of intergovernmental tax immunity notwithstanding the absence of any express provision creating it.

Justice Rehnquist explained that the majority's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist wrote, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions," but under the majority's decision they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437.

Hall is inconsistent with this Court's subsequent sovereign-immunity precedents, which repudiated two of *Hall*'s foundational premises. First, the Court has rejected *Hall*'s view that any protection for interstate sovereign immunity must be explicitly located in the constitutional text. To the contrary, the Court has repeatedly recognized that States continue to enjoy the immunity they possessed before the ratification of the Constitution, unless the Constitution abrogated that immunity, and thus that the scope of States' immunity must be discerned not just by the constitutional text but by the historical record and the intent of the Framers. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Second, the Court has emphasized the importance of state sovereign immunity in safeguarding the dignity and self-government interests of the States—interests neither recognized nor accounted for in *Hall*. *Id.* at 714-715; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996).

A. *Hall* Ignored The Framing-Era Understanding Of Interstate Sovereign Immunity

In *Hall*, as discussed above, the Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. 440 U.S. at 421, 426. The dissenting Justices criticized the majority for its undue focus on the constitutional text to the exclusion of other modes of constitutional interpretation. Subsequent decisions of this Court have made clear that the *Hall* dissenters, and not the majority, employed the correct mode of constitutional interpretation.

First, whereas *Hall* reasoned that neither Article III nor the Eleventh Amendment expressly codified interstate sovereign immunity, 440 U.S. at 421—and refused to "infer[]" such a doctrine "from the structure of our Constitution," *id.* at 426—this Court's decisions have since made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729. In *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), for example, the Court observed that "the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Id.* at 446. In *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court described the Eleventh Amendment as just "one particular exemplification of [States' sovereign] immunity." *Id.* at 753. And in *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247 (2011), the Court observed that the Eleventh Amendment merely "confirm[s] the structural understanding that States entered the Union with their sovereign immunity in-

tact." *Id.* at 253; *see also Seminole Tribe*, 517 U.S. at 54; *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).[3]

It is necessary to look beyond the constitutional text, the Court has explained, because neither the original Constitution nor the Eleventh Amendment "explicitly memorializ[es] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified." *Federal Mar. Comm'n*, 535 U.S. at 753. Indeed, "[t]he Constitution never would have been ratified if the States ... were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239 n.2 (1985).

Second, and relatedly, the Court's post-*Hall* decisions recognize that the way to determine the principles of state sovereign immunity implicit in the constitutional structure is to examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890)). Whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, the Court has since taken the opposite approach. It has recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the

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[3] Even decisions before *Hall*—most notably *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—recognized that the constitutional principle of state sovereign immunity is not limited to the express terms of the Eleventh Amendment and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to brief citations in footnotes. 440 U.S. at 420 nn.18, 20.

States enjoyed before the ratification of the Constitution," and that the States "retain" the same degree of sovereignty "today ... *except as altered by the plan of the Convention.*" *Alden*, 527 U.S. at 713 (emphasis added). The Court has thus "presum[ed]" that sovereign immunity prohibits "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755.

The Court's more recent precedents thus explain why *Hall* reached the wrong answer: It asked the wrong question. The relevant question is not whether the Constitution explicitly codified interstate sovereign immunity but, rather, whether it abrogated the immunity that States had previously enjoyed in each other's courts.

As discussed below, a considerable body of historical evidence establishes that the Framers did not intend to abrogate States' immunity in the courts of other States. First, States were immune from suit in each other's courts during the pre-ratification era. Second, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before. Third, the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts. That consensus is further confirmed by pre-*Hall* decisions of this Court and state courts. *Hall* barely engaged with any of this history. *See, e.g.*, Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70

Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due.").[4]

1. Before the Constitution, States were immune from suit in each other's courts

Before the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. That was clear from the reaction to *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), in which a Pennsylvania citizen sued in the Pennsylvania courts to attach property belonging to Virginia. The suit "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order." *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). Virginia "applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general, William Bradford, to secure the action's dismissal." Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994). And

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[4] In addition to reflecting a mode of analysis that has been repudiated by this Court's later decisions, the *Hall* Court's inattention to history can at least partly be explained by the manner in which that case was presented to the Court. First, the state-court decision reviewed in *Hall* rejected Nevada's claim of sovereign immunity on grounds different from those embraced by this Court. The California Supreme Court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972). Second, the respondents before this Court largely advanced the argument on which the California Supreme Court had relied and barely addressed the constitutional issues. *See* Resp. Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking, *see, e.g.*, *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988).

Bradford—who later became Attorney General of the United States under President Washington—urged that the case be dismissed on the ground that each State is a sovereign and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Nathan*, 1 U.S. at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan marked "a decisive rejection of state suability in the courts of other states," Pfander, 82 Calif. L. Rev. at 587, one with which the Framers were intimately familiar. Not only was the case highly publicized at the time, but James Madison was one of the Virginia delegates who sought its dismissal, and Thomas Jefferson—then Governor of Virginia—took a particular interest in the case as well. *See id.* at 586-587.

Another decision from the same time period—*Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697)—reflects the same understanding of state sovereign immunity. In that case, the crew of a South Carolina ship sued the vessel in admiralty to recover wages they were allegedly due. As in *Nathan*, the Pennsylvania admiralty court dismissed the action because the attached vessel was owned by the "sovereign independent state" of South Carolina. *Id.* at 574; *see* Pfander, 82 Calif. L. Rev. at 587 n.127; *see also National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant").

Thus, it was widely accepted before the ratification of the Constitution that States' sovereign immunity from suit extended to proceedings in the courts of other States.

2. The Constitution did not abrogate States' immunity from suit in each other's courts

As discussed above, the relevant question under this Court's post-*Hall* decisions is whether the "the plan of the Convention" *"altered"* the immunity that States enjoyed before ratification, *Alden*, 527 U.S. at 713 (emphasis added)—not whether the Constitution explicitly codified that immunity. The historical evidence from the ratification debates makes clear that the Framers had no desire to strip States of their pre-ratification immunity from suit in the courts of other States. To the contrary, the ratification debates reinforced the pre-ratification understanding of state sovereign immunity.

The question of States' sovereign immunity in the new federal courts was central to the debate over Article III's proposed extension of the "Judicial Power" of the United States to cases "between a State and Citizens of another State," U.S. Const. art. III, § 2, cl. 1. Antifederalists, who assailed that provision of the draft Constitution, based their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without their consent. For example, the Federal Farmer contrasted Article III's requirement that a State "answer to an individual in a court of law" with the fact that "the states are now subject to no such actions." *Federal Farmer No. 3* (Oct. 10, 1787), *in* 4 *The Founders' Constitution* 227 (Kurland & Lerner eds., 1987). The Antifederalist Brutus similarly attacked Article III for requiring States to "answer in a court of law, to the suit of an individual," noting that "[t]he states are now subject to no such actions." Brutus No. 13 (Feb. 21, 1788), *in* 4 *The Founders' Constitution* 237, 238.

Proponents of ratification offered two conflicting responses, but neither response disputed the premise that suits by a citizen of one State against a different nonconsenting State were unprecedented. One response was offered by Federalists who contended that Article III *did* abrogate state sovereign immunity in such suits in federal court, and who viewed that as a virtue of the new federal courts, for those courts would provide a forum for suits that could not otherwise be brought. Those Federalists argued that Article III provided federal jurisdiction over suits by individuals against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Pendleton, *Speech to the Virginia Ratifying Convention, in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Elliot ed., 1836) (hereinafter *Elliot's Debates*).

An alternative response was offered by Federalists who argued, contrary to the Antifederalists' interpretation, that Article III did *not* abrogate state sovereign immunity in suits brought by individuals. But although those leading proponents of ratification took issue with the Antifederalist view of what Article III accomplished, they embraced the premise that a suit by a private individual against a nonconsenting State would be an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part of the reason Article III did not authorize them in federal court. Alexander Hamilton, for example, wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," an immunity he characterized as "now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 511 (Rossiter ed., 1961) (Hamilton). Hamilton added

that such immunity would "remain with the States" absent a "surrender" of it in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued that "[i]t is not in the power of individuals to call any state into court," 3 *Elliot's Debates* 533, and John Marshall claimed that "[i]t is not rational to suppose that the sovereign power should be dragged before a court," *id.* at 555. Although those remarks concerned the jurisdiction of the federal courts to be established under Article III, their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns "most plausibly included suits in the courts of another state" as well. Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 256-257.

In short, although the ratification debates focused on whether States would be subject to suit in federal court, the tenor of the debates made clear that the Framers fully intended for States to remain immune from suit in the courts of other States. Article III was thus "enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, 2006 Sup. Ct. Rev. at 263; *see also id.* at 253 (interstate sovereign immunity was a "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III). As Justice Blackmun recognized in his dissent from *Hall*, the "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting).

3. The history of the Eleventh Amendment confirms the understanding that States were immune in each other's courts

The Framing-era understanding of interstate sovereign immunity was confirmed by the reaction to this Court's decision in *Chisholm* v. *Georgia* that States could be sued in federal court, without their consent, by citizens of another State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). That description was if anything an understatement of the reaction within state capitols. The Massachusetts Legislature denounced *Chisholm* as "repugnant to the first principles of a federal government," while the Georgia House of Representatives made any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden*, 527 U.S. at 720-721. The backlash culminated in the enactment of the Eleventh Amendment, which provided that the federal judicial power did not extend to suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The uprising against *Chisholm* confirmed the depth and breadth of the understanding that States could not be sued by individuals, without their consent, in *any* courts—not their own, not the federal courts, and certainly not another State's courts. The Connecticut legislature, for example, pronounced its desire that "speedy and effectual measures be adopted to procure an alteration" of the Constitution to make clear that "no State can on any Construction be held liable ... to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793), *in* 5 *The Docu-*

mentary History of the Supreme Court of the United States, 1789-1800, at 609 (Marcus ed., 1994) (hereinafter *Documentary History*). The Virginia legislature declared that "a state cannot ... be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793), *in* 5 *Documentary History* 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793), *in* 5 *Documentary History* 610-611. And John Hancock, in a speech to the Massachusetts General Court, rejected the idea that "each State should be held liable to answer ... to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793), *in* 5 *Documentary History* 416.

The notion that the Framing generation would so strongly and universally condemn suits brought by citizens of one State against another State in the neutral federal courts, while tolerating such suits in the plaintiffs' home-state courts, strains credulity. As the *Hall* dissenters emphasized, the objectors to *Chisholm* were hardly embracing the view that Georgia could not be sued by Chisholm in federal court but *could* be sued by Chisholm in South Carolina state court. Although the Eleventh Amendment does not explicitly address interstate sovereign immunity, it shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State."

Hall, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). By immunizing States from suit in the neutral forum of the federal courts, while leaving open the possibility of their being sued in the potentially hostile courts of another State, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

4. Pre-*Hall* decisions of this Court and other courts reflect the Framing-era consensus

This Court's pre-*Hall* decisions reflect the Framing-era understanding that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1857), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added). In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court stated with equal clarity that "neither a state nor the United States can be sued as defendant in any court in this country without their consent." *Id.* at 451. In *Hans* v. *Louisiana*, the Court observed that "[t]he suability of a State without its consent was a thing unknown to the law" at the time the Constitution was ratified, and that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15-16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts,

those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them." *Id.* at 80.

States recognized the same principle. In *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929), for example, the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. "[S]o carefully ha[d] the sovereign prerogatives of a state been safeguarded in the Federal Constitution," it held, that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty." *Id.* at 55. Likewise, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to entertain suits against sister States in its own courts; rather, it enacted a statute allowing citizens to assign to the State claims that the State would then pursue in original actions before this Court. *See New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-89 (1883).

That pre-*Hall* understanding of interstate sovereign immunity is confirmed by the surprised reaction of state supreme courts to the decision in *Hall*. The New York Court of Appeals remarked, a year after *Hall*, that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co.* v. *University of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise noted that "[f]or the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," because "this immunity was an attribute of state sovereignty that was preserved in the Constitution."

Struebin v. *State*, 322 N.W.2d 84, 85 (Iowa 1982). And the Delaware Supreme Court later observed that "[f]or almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts." *Kent Cty.* v. *Shepherd*, 713 A.2d 290, 297 (Del. 1998).

5. Hyatt's reliance on *The Schooner Exchange* is unavailing

1. Hyatt's brief in opposition to certiorari argued (at 12-14) that the pre-ratification understanding of state sovereign immunity does *not* support the conclusion that States are immune from suit in each other's courts, because it distinguished "between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign." The latter, Hyatt argued, was purely a matter of comity and not a legal right. Hyatt based that argument on this Court's decision in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Hyatt's argument misinterprets *The Schooner Exchange*, which addresses relations among independent nations and sheds no light on the distinct question of interstate sovereign immunity under our constitutional structure.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation possesses "exclusive and abso-

lute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

The Schooner Exchange supports the view that nations lack any judicially enforceable obligation to respect the sovereign immunity of other nations that are sued in their courts. But that proposition simply reflects the absence of any supranational tribunal that could enforce one nation's rights against another. Because a forum nation cannot be forced to recognize a defendant nation's sovereign immunity, its choice whether to do so depends on a set of considerations sometimes referred to as comity—"standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *National City Bank*, 348 U.S. at 362. Nor, conversely, are defendant nations limited to legal recourses if the nation in whose courts they are sued chooses not to respect their sovereign immunity. Rather, the defendant nation may avail itself of recourses like "the negotiation of treaties, the exchange of ambassadors, and, if necessary, ... war." Pfander, 82 Calif. L. Rev. at 583; *see also* Vattel, *The Law of Nations or the Principles of Natural Law*, bk. IV, ch. VII § 102 (1758) (Fenwick trans., 1916) (the "proper course" to punish a "State which had violated the Law of Nations" was "public war").

In the pre-ratification era, the relationship among States was similar to that among independent nations:

No State could be required to respect another's sovereign immunity in its courts.[5] But in that respect, the Constitution *did* change the pre-ratification relationship among the States, by creating exactly the sort of neutral tribunal among the States that is lacking among nations—this Court. If the courts of one State entertain a suit against another State, the defendant State now has recourse to this Court to vindicate its sovereign immunity. And just as the Constitution created that judicial enforcement mechanism, it withdrew from States the extrajudicial recourses available to nations, as well as the ability to refuse to recognize the judgment of another State. *See* U.S. Const. art. I, § 10 (prohibiting States from entering into treaties, imposing import duties, or waging war); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the ... judicial Proceedings of every other State."); *Kansas* v. *Colorado*, 185 U.S. 125, 141 (1902) (traditional "remedies resorted to by independent states for the determination of controversies raised by collision between them" were "withdrawn from the states by the Constitution"); Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 92 (2003) (the Constitution "specifically divested the states of the traditional sovereign powers of diplomacy"). The Constitution thus substituted a judicial means of enforcing interstate sovereign immunity for the extrajudicial options available to independent nations. *See* Rogers,

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[5] That is why, when Virginia was sued in Pennsylvania's courts before the ratification of the Constitution (*see supra* pp. 21-22), it "followed the usual diplomatic course" in seeking the dismissal of the suit: "[I]t applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general ... to secure the action's dismissal," on the ground that it "violated the law of nations." Pfander, 82 Calif. L. Rev. at 585-586.

Applying the International Law of Sovereign Immunity to the States of the Union, 1981 Duke L.J. 449, 468 (this Court was envisioned as a "substitute" for the "methods that sovereign states use to enforce their rights under international law," such as "diplomacy and war").

Because the Constitution allows States to vindicate their sovereign immunity against other States in a way that independent nations cannot, *The Schooner Exchange*—which reflected the absence of an enforcement mechanism in the international context—has no bearing on the issue of interstate sovereign immunity. That is why, in the 167 years between *The Schooner Exchange* and *Hall*, no federal or state court cited *The Schooner Exchange* as even tangentially relevant to the question whether States are immune from suit in the courts of other States.

If *The Schooner Exchange* were read to mean that States may freely choose to entertain suits against other States, it would be inconsistent with the long historical understanding to the contrary, discussed above. And such an interpretation would run perversely counter to the constitutional plan, by undermining the Framers' effort to calm the interstate tensions that prevailed under the Articles of Confederation. *See, e.g.*, Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1873-1874 (2010) (the Framers drafted Article III with an eye toward resolving interstate disputes peacefully). If Hyatt were correct that States could choose to entertain suits brought by their citizens against other States, then a decision by one State's courts to hear a dispute involving another State could give rise to exactly the kind of simmering resentment, or reprisal, that the Framers hoped to avoid.

2. Hyatt further argues (Opp. 15-16) that States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States. That is true. But in a federal union, that sovereignty interest is not unqualified, and it must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States. There is little question which of those competing interests carried greater weight at the time the Constitution was ratified, and equally little question which interest the States prefer to protect today.

As discussed above, the Framing generation thought it anathema that one State might be subjected to suit in another's courts—hence the reaction to *Nathan* v. *Virginia*, in which a Pennsylvania citizen sought to attach Virginia's property in the Pennsylvania courts. *See supra* pp. 21-22. Virginia was not the only State with sovereignty interests at stake in *Nathan*; Pennsylvania had an interest in adjudicating a suit arising within its borders. But no one thought that interest should outweigh Virginia's. To the contrary, Pennsylvania's own attorney general, at the direction of the State's Supreme Executive Council, urged the dismissal of the suit. *Id.* The Framers' purpose was to knit the States together into a federal union that would protect each State's sovereignty while permitting the States to resolve disputes amicably. *See* Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 582-583 (2001). That goal is advanced by recognizing Virginia's immunity from suit in Pennsylvania; it would be considerably threatened by prioritizing Pennsylvania's ability to hear a suit against Virginia.

Furthermore, the States' overwhelming support for overruling *Hall*—as evidenced by the amicus brief in support of certiorari filed by 45 States—makes clear

which sovereignty interest States prefer to vindicate today. Given the extraordinary burdens that States face when haled into the courts of another State, it is little surprise that States care more about avoiding those burdens than they do about allowing their courts to adjudicate each and every dispute that arises within their borders.

This compromise of one sovereignty interest in favor of another was not thrust upon the States; it was part and parcel of every State's choice to ratify the Constitution. As the Court recognized in *The Schooner Exchange*, a nation can "consent" to "exceptions ... to the full and complete power" of its courts within its borders. 11 U.S. at 136. By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes. In particular, the States relinquished jurisdiction (or allowed Congress to limit their jurisdiction) where adjudication in state court would be inconsistent with the federal structure. Thus, for example, the States accepted that only this Court may adjudicate disputes between States, U.S. Const. art. III, § 2, cl. 1, and that Congress may channel suits against the federal government, federal officers, foreign states, and ambassadors into the federal courts (as it ultimately chose to do, *see, e.g.*, 28 U.S.C. §§ 1251, 1346, 1441, 1442, 2409a).[6] It is likewise inconsistent with the federal structure of the Union for a State's courts to exercise jurisdiction over another State with-

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[6] Similarly, when the States ratified the Fourteenth Amendment, they accepted that the Due Process Clause limits their authority to exercise jurisdiction over cases lacking a territorial connection to the State. *See, e.g.*, *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879-881 (2011) (plurality opinion); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292, 294 (1980).

out the defendant State's consent, and the States thus impliedly agreed to cede jurisdiction over such suits.

In sum, *Hall* was wrongly decided because it ignored the Framing-era understanding of interstate sovereign immunity. *Hall* focused on the question whether the Constitution expressly codified that immunity, whereas this Court's later precedents have made clear that the relevant question is whether the Framers intended to *abrogate* the immunity the States enjoyed before ratification. The historical evidence clearly shows they did not.

B. Post-*Hall* Decisions Have Clarified The Constitutional Values That *Hall* Flouts

Aside from its failure to consider the Framing-era consensus regarding interstate sovereign immunity, *Hall* also gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union. To the extent *Hall* addressed the reasons for state sovereign immunity at all, it suggested incorrectly that they were limited to the protection of States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War"). Although the States' financial integrity is certainly one reason for state sovereign immunity, later decisions, especially *Alden*, have underscored the importance of two additional principles underlying sovereign immunity that are inconsistent with *Hall*.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715; *cf. Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) ("Sovereignty implies immunity from

lawsuits."). The States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereignty "together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714; *see id.* at 749.

The States' dignity interests as sovereigns, though given little attention by *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental feature of state sovereign immunity. In *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), for example, the Court explained that sovereign immunity "is designed to protect" "the dignity and respect afforded a State." *Id.* at 268; *see also Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment ... serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]'"); *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (the Eleventh Amendment "accords the States the respect owed them as members of the federation"). Indeed, the Court has characterized the protection of States' "dignity[,] ... consistent with their status as sovereign entities," as "[t]he *preeminent* purpose of state sovereign immunity." *Federal Mar. Comm'n*, 535 U.S. at 760 (emphasis added).

Second, and equally important, is the Court's recognition that state sovereign immunity promotes self-government by the citizens of the States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'"

Alden, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Court has recognized since *Hall* that, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—and certainly not by judicial decree of another State. *Alden*, 527 U.S. at 751.

This case well illustrates how *Hall* disserves the interests that state sovereign immunity is supposed to protect. California has been subjected to an astonishing intrusion on its dignity, as well as the concrete burdens of litigation, by being forced to defend the conduct of a state agency in the courts of another State. This litigation required years of discovery and a four-month trial, and it resulted in a judgment against the FTB of nearly $500 million. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). The judgment was eventually reduced by the Nevada Supreme Court and this Court on the basis of constitutional and comity concerns, *see id.* at 1280, 1282-1283—but the FTB *still* faces a judgment of $100,000, with the potential for Hyatt to seek costs in a remand proceeding that could itself spawn further appeals, Pet. App. 65a-66a.

California has also suffered harm to its citizens' interest in self-government. In *Alden*, as noted above, the Court recognized a State's immunity in its own courts, partly on the basis that a State's "'administration of [its] public affairs'" could otherwise "become 'subject to and controlled by the mandates of judicial tribunals ... and in favor of individual interests.'" 527 U.S. at 750. If that danger was present where Maine's conduct was subject to review in its own courts, it is even clearer here, where the actions of a California

agency have been litigated before Nevada judges and jurors who lacked any incentive to consider the burden that a large financial sanction would impose on California's taxpayers.

None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising from their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

II. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

Although this Court is ordinarily loath to overrule its precedents, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In particular, "*stare decisis* does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of, ... constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As explained above, this Court's sovereign-immunity decisions since *Hall* have undermined *Hall*'s reasoning and left it an outlier.

Moreover, none of the other stare decisis factors counsels against overruling *Hall*. *Hall* does not involve a statutory interpretation, which the Court is ordinarily more reluctant to overrule. *Hall* has given rise to no reliance interests. And *Hall* has proven impracticable in its "real world implementation," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

A. The Court's Post-*Hall* Jurisprudence Has Left *Hall* An Outlier

"[T]he Court has not hesitated to overrule an earlier decision" where "intervening development of the law" has "removed or weakened the conceptual underpinnings [of] the prior decision" or "rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also, e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). A decision is properly overruled, the Court has explained, where the "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). The development of sovereign-immunity doctrine since *Hall* is thus reason enough to overturn that decision.

As explained above (at 18-20), this Court's more recent cases have rejected the key "conceptual underpinning[]" of *Hall*—namely the idea that a State's sovereign immunity is limited to the express terms of the Constitution. *Hall* is also inconsistent with the Court's recognition in more recent decisions of the values underlying the doctrine of sovereign immunity. *See supra* pp. 36-39. *Hall* thus represents an outmoded way of thinking and is "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

Hall is also out of step with this Court's recognition of state sovereign immunity in other contexts. Even at the time *Hall* was decided, it created a striking anomaly in this Court's sovereign immunity jurisprudence: States could not be sued in their own courts, or in the neutral federal courts, but could be sued in the poten-

tially hostile courts of sister States. That anomaly has grown even more glaring over time, as the Court has decided case after case expanding the reach of sovereign immunity for States and Indian Tribes.

Since *Hall*, for example, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court. *See Seminole Tribe*, 517 U.S. at 47. The Court has also held that state sovereign immunity extends to federal agency adjudications. *Federal Mar. Comm'n*, 535 U.S. at 747. And it has immunized States against federal claims brought by individuals in the defendant State's own courts. *Alden*, 527 U.S. at 712. Those decisions, when contrasted with *Hall*, have created a "bizarre state of doctrinal affairs" in which "the states have more authority with respect to each other than the federal government has with respect to the states." Smith, 89 Va. L. Rev. at 101. Even as the Court has recognized the constitutional imperative to shield States from litigation in one tribunal after another, it has exempted from that otherwise consistent doctrinal progression the single type of forum potentially most hostile to a State's interests—the courts of another State.

It is also hard to reconcile *Hall* with this Court's decisions recognizing the sovereign immunity of Indian Tribes. The Court has long held that Tribes possess "the 'common-law immunity from suit traditionally enjoye[d] by sovereign powers.'" *Bay Mills*, 134 S. Ct. at 2030. It had applied that immunity even before *Hall* to suits against Tribes by States, even when brought in the plaintiff State's own courts. *See id.* at 2031 (citing prior cases). After *Hall*, the Court held that a Tribe's immunity extends even to "suits arising from [its] commercial activities, even when they take place off

Indian lands." *Id.* (citing *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)). The Court reaffirmed that holding in *Bay Mills*. *Id.* at 2036-2039. Those decisions have created what several Justices have recognized as a "striking[] anomal[y]"—that is, that Tribes have "broader immunity than the States," *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting, joined by Thomas and Ginsburg, JJ.), even though they arguably possess less sovereignty than the States, *see Bay Mills*, 134 S. Ct. at 2030-2031 (noting the "qualified nature of Indian sovereignty").

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles. *See* Fallon et al., *Hart & Wechsler's The Federal Courts & The Federal System* 976 n.2 (7th ed. 2015) (noting the "difficulty of reconciling *Hall*'s rationale with that of *Alden*"); *see also* Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037 n.110 (2000).

In short, *Hall* cannot be reconciled with this Court's subsequent decisions, which have emphasized the need to look beyond the constitutional text to consider the historical understanding of state sovereign immunity, articulated the values that state sovereign immunity protects, and recognized the immunity of

States in contexts that pose less of a threat to sovereignty than allowing States to be haled into the courts of other States. Because *Hall* is a jurisprudential outlier, it can be overruled without threatening other precedents.

B. Stare Decisis Has Little Force Here Because *Hall* Is A Constitutional Decision That Has Not Engendered Reliance Interests

The other stare decisis factors, moreover, provide the Court no reason to perpetuate *Hall*'s error merely for the sake of consistency.

First, stare decisis "is at its weakest" when, as in *Hall*, the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235. In such cases, only the Court can correct the error of a prior decision, because "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (internal quotation marks omitted).

Second, stare decisis is further weakened here—more than in many cases involving constitutional issues—because sovereign immunity "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), and rules governing sovereign immunity therefore do not engender reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). Here, by contrast, no parties "have acted in conformance with existing legal rules in order to conduct transactions," *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010), or have otherwise conducted their lives in a

manner that assumes the continuing vitality of a constitutional precedent.

C. *Hall* Has Proven Harmful In Practice

The decades since *Hall* have also exposed that decision's "practical deficiencies," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009), and the extent to which it undermines the values underlying the sovereign-immunity doctrine. None of Hyatt's proposed workarounds can cure the problems *Hall* creates.

1. This case exemplifies the damage that suits permitted by *Hall* can cause.

One purpose of sovereign immunity is to "shield[] state treasuries" from private litigants. *Federal Mar. Comm'n*, 535 U.S. at 765; *see also Alden*, 527 U.S. at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."). Yet Hyatt has forced California to spend vast sums of taxpayer money defending itself. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation. Once the case finally reached trial, the Nevada jury was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. Since trial, California has spent another ten years fighting that verdict, and it will face additional proceedings on remand if this Court upholds *Hall*. And although appeals succeeded in trimming the trial court's half-billion-dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-751.

Such damages awards necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

Another purpose of sovereign immunity, as discussed above, is to protect the "dignity and respect" States are owed in our federal union. *E.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 268. This suit has offended that purpose as well, by forcing California to submit its official conduct to the review of another State's judiciary and jury. And that harm is exacerbated because the conduct in question involves taxation, which "is an essential attribute of sovereignty," *Railroad Co.* v. *Maine*, 96 U.S. 499, 508 (1877). In short, this case shows how *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State in conducting a core sovereign function, *Alden*, 527 U.S. at 750.[7]

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[7] This case may not even fully represent the extent of *Hall*'s harmful effects in the long-running dispute between Hyatt and the FTB. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting he may yet try to bring another tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-034 (Dec. 5, 2016) (Hyatt's brief before California State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

Furthermore, in case there were any doubt that suits of this nature disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, on the view that it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, Nev. Lawyer, Jan. 2015, at 24 & n.9.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation that would only compound the costs imposed by Hyatt's suit. For example, another taxpayer sued the FTB on fraud claims in Washington state court in 2015; more than three years later, that suit remains pending. *See* Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. Mar. 20, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Such copycat suits are regrettable yet, given *Hall*, unsurprising. Sovereign governments undertake many responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority.

California is not alone in facing *Hall*'s consequences. States are regularly haled into the courts of a sister State against their will, and (unlike in *Hall* itself) those suits often challenge acts of public policy, thus striking at the heart of the dignity and self-government concerns underlying sovereign immunity. Recently, for example, Nevada has been sued without its consent in the California courts. The pending petition for certiorari in *Nevada Department of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018), arises from a suit against Nevada Department of Wildlife officials in California court, alleging torts arising from a wildlife training presentation to California law enforcement officials; Nevada asks the Court to overrule *Hall* even though its own courts exercised jurisdiction over the FTB in this case. In another case against Nevada, the plain-

tiff—demanding monetary and equitable relief—challenged Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally used them to travel to California. Pet. for Cert. i, *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy—intrusions of the sort that sovereign immunity is meant to prevent. *See* Decl. of Kristine Poplawski, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015).

Nor is Nevada the only other State that has been sued without its consent in cases that implicate its sovereignty interests. In *Faulkner* v. *University of Tennessee*, 627 So. 2d 362 (Ala. 1992), for example, a former graduate student at the University of Tennessee asked an Alabama court to stop the university from revoking his doctoral degree after it determined that his dissertation did not contain original work. *Id.* at 363-364. The Supreme Court of Alabama ruled that the courts should exercise jurisdiction over the case because the University of Tennessee is not subject "to the will of the democratic process in Alabama," *id.* at 366—thus subjecting it, rather perversely, to the control of the Alabama courts. And in *Head* v. *Platte County*, 749 P.2d 6 (Kan. 1988), the Supreme Court of Kansas held that state courts should exercise jurisdiction over a suit alleging that a Missouri county and Missouri officials failed to train employees and establish policies concerning the execution of arrest warrants, thus permitting Kansas courts to decide which policies Missouri law enforcement officials should or should not adopt. *Id.* at 7-10. The States that supported certiorari in this case

supplied numerous other examples. Br. of Indiana and 44 Other States as Amici Curiae in Support of Pet'r 8-10. In each of those cases, *Hall* allowed state courts to interfere with the public policy choices made by another State.

2. Hyatt's brief in opposition to certiorari argued (at 12, 17) that any detrimental effects of *Hall* can be mitigated through the "voluntary doctrine of comity." But this case—which, ironically, Hyatt cited as an example of the proper functioning of that doctrine—demonstrates the inadequacy of relying on comity to protect the values underlying sovereign immunity. Comity has not saved the FTB from the burdens of litigation or prevented the Nevada courts from interjecting themselves into the tax-collection process here. And even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cited (Opp. 12), the defendant—an Arizona governmental trust—had to litigate for nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities (but not the one-year statute of limitations that Arizona courts would have applied). Comity is no substitute for a clear rule of sovereign immunity, which allows a defendant State to terminate litigation quickly and without incurring the extraordinary costs seen in this case, in *Sam*, and in many other cases.

Hyatt also contended (at 17) that States could enter into an agreement to confer immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely the Consti-

tution. "It is inconsistent with the Court's proper role to ask [the States] to address a false constitutional premise of this Court's own creation." *Wayfair*, 138 S. Ct. at 2096. Interstate compacts "can take decades, or longer, to hammer out," Br. of Amicus Curiae Multistate Tax Comm'n in Support of Pet'r 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

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QUESTION PRESENTED

Whether there is a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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STATEMENT OF THE CASE

The underlying facts

This lawsuit concerns intentional tortious acts committed by the Petitioner, California Franchise Tax Board ("the Board"), and its employees while seeking to build a case to assess additional state income taxes against Gilbert P. Hyatt. The torts against Hyatt occurred while he was a resident of Nevada and thus this case is about the ability of that state to provide a remedy for one of its citizens who has been seriously injured. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495 (2003) ("[T]he plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada.")[1]

The Board speaks of the "astonishing intrusion" to the dignity of California for having to defend in Nevada the intentionally tortious acts committed by California officials in Nevada. Brief for Petitioner at 38. But the astonishing intrusions were the other way around: the Board never acknowledges the egregious, tortious behavior of the Board and its employees directed at Hyatt. To be clear, this case does not involve alleged misconduct merely stated in a pleading. Rather, after a lengthy contested trial, a jury found that the

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[1] The Brief Amicus Curiae of Alan B. Morrison & Darien Shanske in Support of Neither Party mistakenly asserts that the "vast majority" of the acts by the Board and its employees against Hyatt occurred in California. *Id.* at 9. Quite the contrary, the torts that occurred and were the basis for the jury's verdict largely occurred in Hyatt's state of residence, Nevada.

Board and its employees had committed intentional torts. Then, after a careful review of the evidence from the trial, the Nevada Supreme Court affirmed the decision of the trial court that torts had been committed against Hyatt.

The evidence at trial showed that the Board's lead auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the lead auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. The lead auditor operated on the view that most of the large income taxpayers in California were Jewish. 4/28/08 RT at 132:2-23; 140:11-141:25. According to testimony from a former Board employee, the lead auditor freely discussed personal information about Hyatt—much of it false—causing her former colleague to believe that the lead auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The lead auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After the lead auditor had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The lead auditor's incessant discussion of the investigation conveyed the impression to others within the Board that she had become "obsessed" with the case. *See*

4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, the lead auditor pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and other estranged members of Hyatt's family against him. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. The lead auditor often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

Fueled by the lead auditor's desire to "get" Hyatt, the Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with "Demand[s] for Information" about Hyatt and disclosed his confidential home address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his two places of worship in Nevada and to a Nevada newspaper. *See* 83 RA at 020653-54, 020668-69, 020735-36, 020745. The Board also disclosed its investigation of Hyatt to patent licensees of the U.S. Philips Corporation in Japan. *See* 84 RA at 020788, 020791.[2] The Board knew that Hyatt, like other private inventors, had significant concerns

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[2] Hyatt signed an agreement in July 1991 with the U.S. Philips Corporation granting Philips the exclusive authority to license Hyatt's patents.

about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, a tax attorney representing Hyatt, that tax payments were the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.2. The Board employee told Cowan that there would "extensive" demands for information from Hyatt, while simultaneously raising the subject of "settlement possibilities" in regard to the Board's audit and resulting tax assessments. *See* 5/22/08 RT at 80:3-81:2.

The initial litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy, fraud, and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. The Board did not challenge clearly established law that a state does not have sovereign immunity when sued in the courts of another state. *Nevada v. Hall*, 440 U.S. 410 (1979). The Board instead argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court unanimously rejected the Board's argument that it

was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. Although the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Franchise Tax Bd. of Cal. v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)). The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *Id.* at *9. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." *Id.* at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.* Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by

sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.* The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The trial, verdict, and review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages. Pet. App. 11a. This substantial verdict reflects the jury's view that the conduct of the Board and its employees was truly egregious.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014). In doing so, it reduced the Board's liability for compensatory damages to $1 million on Hyatt's fraud claim and remanded the case for a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim. *Id.* at 131. Proceeding to the merits, the Nevada Supreme Court set aside much of the judgment against the Board, finding that Hyatt had not established the necessary elements for various other torts under Nevada law. *Id.* at 140.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board's employees had "disclosed [respondent's] social security number and home address to numerous people and entities and that [auditors] revealed to third parties that Hyatt was being audited."

Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* at 145. The court thus determined "that substantial evidence supports each of the fraud elements." *Id.*

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials—a condition on Nevada's waiver of sovereign immunity—to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." *Id.* at 147. The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because in-state officials "'are subject to legislative control, administrative oversight, and public accountability.'" *Id.* at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[ ] outside such controls in this State.'" *Id.* (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a

statutory cap on damages under comity." *Id.* With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability—noting that Hyatt had "suffered extreme treatment" at the hands of the Board (*id.* at 148)—but it reversed the award of damages. Finding errors in the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages on this claim. *Id.* at 149-157.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 154. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that

would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

After briefing and oral argument on both of these questions, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled and therefore "affirm[ed] the Nevada courts' exercise of jurisdiction over California." *Id.* at 1279. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted).

The case on remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court stated: "In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*." *Franchise Tax Bd. of Cal. v. Hyatt*, 401 P.3d 1110, 1117 (Nev. 2017). The Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of

Nevada's statutory damages cap. The court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. *Id.* 121a-122a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also ruled that the statutory damages cap includes prejudgment interest.

SUMMARY OF ARGUMENT

1. The petition for writ of certiorari should be dismissed as improvidently granted.

This is the third time that this case has been before this Court. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

In the first instance, the Board did not raise the issue of whether *Nevada v. Hall*, 440 U.S. 410 (1977), should be overruled. In a unanimous opinion, the Court in *Hyatt I* explained: "[In *Nevada v. Hall*] [w]e affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of

petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

This Court remanded the case and a trial was held. Only after the jury verdict against the Board and the decision of the Nevada Supreme Court affirming key aspects of liability and damages did the Board decide that it wanted this Court to reconsider *Nevada v. Hall*. The Court granted certiorari on the issue of whether to overrule *Nevada v. Hall* and it was briefed and argued. The Court issued its decision on this issue and declared: "The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and *we consequently affirm the Nevada courts' exercise of jurisdiction over California*." *Hyatt II*, 136 S.Ct. at 1279 (emphasis added). This Court, though, did announce a new rule limiting the damages that can be awarded against a state in another state's court: California could be held liable only to the extent that Nevada would be liable in its own courts. *Id.* at 1281. This holding was premised on the affirmance of *Nevada v. Hall*. The Board did not ask for rehearing and reconsideration of this Court's decision.

The case was remanded to the Nevada Supreme Court which, after briefing and argument, lowered the damage award against the Board to $100,000. The Board here does not question any aspect of the Nevada Supreme Court's reasoning or decision.

First, the law of the case doctrine should resolve this case. It is long and firmly established that an

affirmance by an evenly divided Court is a judgment on the merits. *See Durant v. Essex Co.*, 74 U.S. 107, 112 (1869); *Etting v. United States*, 24 U.S. 59, 78 (1826). The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

This Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is the law of the case for this litigation. After the Board did not ask the Court to reconsider *Nevada v. Hall* in *Hyatt I*, Hyatt tried the case and litigated the appeal in reliance on that precedent. After this Court reaffirmed *Nevada v. Hall* in *Hyatt II*, Hyatt litigated the case on remand in reliance on *Nevada v. Hall* being settled law for this case. The Nevada courts likewise handled this matter with the expectation and reliance that *Nevada v. Hall* was the law to be followed in this case. This Court decided the "rule of law" for this case in *Hyatt I* and *Hyatt II* and it would violate the law of the case doctrine and basic fairness to change it now for this litigation.

Second, the Board did not ask this Court to reconsider *Nevada v. Hall* when this case was first here. As the Court noted, the Board expressly chose not to ask the Court to reconsider this decision. *Hyatt I*, 538 U.S. at 497. The Board could have done so then. By failing to do this in the Supreme Court, the Board should be

deemed to have waived the ability to ask for *Nevada v. Hall* to be overruled. *See, e.g.*, *Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived"); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived). Hyatt chose to litigate this case in the Nevada courts, at huge expense, in reliance on this Court's ruling—and reaffirmation—that state governments may be sued in the courts of other states.

Simply put, the Board should be bound by its own choices in this litigation. It could have, but did not ask this Court to reconsider *Nevada v. Hall* when the case was here in *Hyatt I*. It could have, but did not file a petition for rehearing after this Court's decision in *Hyatt II* to reaffirm *Nevada v. Hall*. Because of these choices, the petition in this case should be dismissed as certiorari having been improvidently granted.

2. *Nevada v. Hall* should not be overruled

On the merits, the central issue in this case is whether the Constitution *prohibits* a state court from exercising its sovereign power to provide a forum to its citizens when they are injured by another state. In *Nevada v. Hall*, the Court concluded that a state may exercise its sovereignty to permit such suits and thus the question is whether there is a "compelling justification" for overruling this almost 40-year-old precedent. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S.

197, 202 (1991) (stare decisis requires that there be a "compelling justification" for overruling prior decisions).

The Board's core argument is that this Court's decisions concerning sovereign immunity, especially *Alden v. Maine*, 527 U.S. 706 (1999), undermine *Nevada v. Hall*. The Board, though, misses a crucial distinction: *Alden v. Maine* is about whether a state court is *required* to hear cases against its state government. *Nevada v. Hall* is about whether the Constitution *forbids* a state from choosing to hear suits by its own citizens against another state government. The Tenth Amendment creates a huge difference between compelling a state to do something, which is impermissible commandeering, as opposed to finding that a state is constitutionally prohibited from doing something. *See, e.g.*, *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (explaining the Tenth Amendment forbids the commandeering of state governments).

No case after *Nevada v. Hall* ever suggested that the Constitution imposes a limit on a state's sovereign power to define the jurisdiction of its courts and to provide a remedy for its citizens, including when they are injured by another state. This Court's decisions about the Eleventh Amendment are inapposite because they are about a constitutional limit on *federal* court power. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (emphasis added) (citations omitted) ("For over a century we have reaffirmed that

federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.").

Alden v. Maine dealt solely with whether a state court is constitutionally required to hear a federal claim against its state government by its own citizens. In *Alden v. Maine*, this Court expressly drew a "distinction . . . between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign." 527 U.S. at 739-740.

Thus, unlike any of the other cases about sovereign immunity that the Board cites, this is a case about the Tenth Amendment and whether the Constitution prohibits a state from using its power to provide a forum for its injured citizens. There is nothing in the text of the Constitution which justifies such a limit on state power.

Nevada v. Hall reflects that states have a vital sovereign interest in providing a remedy for their citizens when they suffer injuries. *See, e.g., Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977) (recognizing "the legitimate and substantial interest of the State in protecting its citizens"). As this Court stated in *Nevada v. Hall*, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. *Nevada v. Hall* stressed that there is no constitutional limit on

the ability of a sovereign state to provide a forum for its citizens when they are injured, including by another state.

Quite tellingly, the Board concedes that "[i]n the pre-ratification era . . . [n]o State could be required to respect another's sovereign immunity in its courts." Brief for Petitioner at 31-32. Nor is there anything in the Constitution or its history that establishes a limit on the sovereign power of a state to provide a remedy for its citizens when they are injured by another state. As Justice Thomas declared, "immunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

This, though, does not mean that state governments are without protection when they are sued in other states. This Court ruled in *Hyatt II* that the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. Additionally, state courts can and do accord comity to other states, as in this case where the Nevada Supreme Court ruled that negligence claims could not go forward against the Board and that punitive damages are not available against the Board because of considerations of comity. Moreover, states can enter into agreements that provide for greater immunity. *Nevada v. Hall*, 440 U.S. at 416. Obtaining this protection through comity and mutual agreements is preferable to a new constitutional rule that limits state sovereignty by stripping states of

the power to determine the jurisdiction of their own courts and of the ability to protect their own citizens.

Under the Tenth Amendment a state can do anything except that which is prohibited by the Constitution. There is no constitutional prohibition against a state exercising its sovereignty to provide a forum for its citizens when they are injured by another state. The Board thus has failed to provide the "compelling justification" for overruling a long-standing precedent.

ARGUMENT

I. The Court Should Dismiss This Case As Certiorari Having Been Improvidently Granted

A. The Law of the Case Doctrine Resolves the Issue Before This Court and This Case

1. An affirmance by an evenly divided Court is a decision on the merits

This Court has been clear that the decisions of an equally divided court are binding and conclusive on the parties on the issues presented, although the rulings do not have precedential value for other litigation. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 252 (2016) ("The Supreme Court has long applied the rule that where the Justices reach a tie vote on the judgment in a case, the lower court's

opinion is affirmed. Such a decision binds the parties, but has no precedential value.").

This principle is long established. As early as 1826, Chief Justice John Marshall held that in a case where the Court was equally divided, "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting v. United States*, 24 U.S. 59, 78 (1826). Particularly instructive is this Court's decision in *Durant v. Essex Co.*, 74 U.S. 107, 112 (1869) (cited by this Court in its affirmance in *Hyatt II*, 136 S.Ct. at 1279). Durant filed a bill against the Essex Company for certain real estate. *Id.* at 109. Durant lost in the lower courts and appealed to the Supreme Court. *Id.* at 108. The Supreme Court was equally divided and "affirmed with costs" the Circuit Court's decision. *Id.* Durant, believing that an equally divided court meant that the Court had actually not decided the issue, filed another bill against Essex. *Id.* at 109. Essex argued that the judgment of the equally divided Supreme Court was a bar on the second litigation and the Court agreed. The Court explained that the first suit "was an adjudication of the merits of the controversy," and as such "constitutes a bar to any further litigation on the same subject between the same parties." *Id.*

The Court went on to specifically reject the idea that an equally divided court's judgment constitutes no decision, explaining:

> There is nothing in the fact that the judges of this court were divided in opinion upon the

> question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.
>
> . . . The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Id. at 110-112.

This Court has reaffirmed on many occasions that a decision by an equally divided Court is a conclusive resolution of the law in the litigation between the parties. *See Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910) (explaining both precedent and reason justify the rule that "affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles . . . having [not] been agreed upon by a majority . . . prevents the case from becoming an authority for the determination of other cases); *Neil v. Biggers*, 409 U.S. 188, 191-192 (1972) (explaining that a decision by an evenly divided Court resolves a matter between the parties).

Similarly, in *United States v. Pink*, 315 U.S. 203, 216 (1942), the Court held that a ruling by an equally divided court binds the parties, although it does not have precedential value. The Court explained the significance of its earlier ruling by an evenly divided Court: "*While it was conclusive and binding upon the parties as respects that controversy*, the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." *Id.* at 216 (emphasis added) (citation omitted).

Thus, under precedents stretching back throughout American history, it is firmly established that this Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is a decision on the merits for these parties.

2. Under the law of the case doctrine, the prior decision of this Court in this case should not be reconsidered

This Court has explained that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine protects the parties in litigation by allowing them to rely on a court's ruling in their case without needing to fear that the rug later will be pulled out from under them by a court changing its mind about the law to be applied in their litigation. It also protects lower courts, here the Nevada Supreme Court,

which expended great resources hearing and deciding the issues presented to it because this Court had ruled twice that the Board could be sued in Nevada state court.

Justice Gorsuch, while a Circuit Judge, expressed the importance of this doctrine when he stated:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would 'gradual[ly] undermin[e] . . . public confidence in the judiciary.'

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240 (10th Cir. 2016) (citations omitted). This is the rationale that this Court has followed in articulating the law of the case doctrine. *See, e.g., Arizona v. California*, 460 U.S. at 618.

Having split 4-4, this Court, of course, could have dismissed the petition for certiorari as improvidently granted or it could have put the case over for

reargument instead of deciding it. Neither of these actions would have produced a decision on the merits. But instead this Court expressly chose to "affirm the Nevada courts' exercise of jurisdiction over California." *Hyatt II*, 136 S.Ct. at 1279. Having reaffirmed that principle of law, this Court went on to address the question of whether the Full Faith and Credit Clause required the Nevada court to reduce damages to the amount that could be awarded against Nevada agencies under these circumstances, an issue necessarily dependent on its affirmation of *Nevada v. Hall*. The parties and the Nevada Supreme Court then relied on this ruling, exactly as the law of the case doctrine is meant to facilitate. As this Court explained, the law of the case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

If the Board did not want this Court's decision to be the law of the case in this litigation, the Board could have moved this Court for rehearing after its decision in *Hyatt II*. *See* Rule 44, Rules of the Supreme Court of the United States ("Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time."). It did not do so. It is therefore bound by the Court's decision in *Hyatt II* as the law of the case for this litigation.

3. The application of the law of the case doctrine is particularly important in this lengthy and complex litigation

Although the law of the case doctrine is discretionary, this Court has been clear that "*as a rule courts should be loath* [to depart from it] . . . *in the absence of extraordinary circumstances* such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 817-818 (1988) (emphasis added) (quoting *Arizona v. California*, 460 U.S. at 618 n.8); *see also Agostini v. Felton*, 521 U.S. 203, 236 (1997) (internal quotation marks omitted) ("The [law of the case] doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.").

But whatever the Court ultimately decides concerning whether to overrule *Nevada v. Hall*, it cannot be asserted that it was "clearly erroneous" or that following it would "work a manifest injustice." Overruling *Nevada v. Hall* in *this litigation* would be a manifest injustice to Gilbert Hyatt. This litigation has gone on for over 20 years. Both sides have spent an enormous amount of time and money litigating the issues. The costs, even apart from attorney's fees, have been huge. Hyatt has undertaken this litigation in full reliance on the decisions of this Court. The Board did not challenge *Nevada v. Hall* in the first phase of litigation, expressly telling this Court it was not doing so. Hyatt relied on this, and that the viability of *Nevada v. Hall* was not at

issue, in taking this case to trial and in defending the appeals.

After this Court's decision in *Hyatt II*, Hyatt continued to litigate the matter in the Nevada Supreme Court in reliance on this Court's ruling in his case to reaffirm *Nevada v. Hall* and affirm the Nevada court's jurisdiction over this issue. It would be unjust to change the law in this case and expose Hyatt to the potential of having to bear the costs that the Board has incurred in this litigation, as well as the costs Hyatt incurred in reliance on this Court's affirmation of Nevada's jurisdiction. Hyatt properly and justifiably relied on this Court's decisions as to the law in his case, which were binding on the Nevada courts, and the law of the case doctrine protects his reliance. If litigants are to count on prior rulings to mean anything in their case, that must start with respect for decisions by this Court. And this is especially true here, where this Court, despite two opportunities to do so, did not disturb its holding in *Nevada v. Hall*.

Of course, this Court might reconsider *Nevada v. Hall* in other cases presenting that issue.[3] But in this litigation, this Court affirmed the Nevada courts' exercise of jurisdiction over the Board, reaffirmed *Nevada v. Hall*, and remanded for further proceedings. *Hyatt*

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[3] In fact, there is a petition for a writ of certiorari now pending in another case posing the same issue. Petition for Writ of Certiorari, *Nevada Department of Wildlife v. Smith*, No. 17-1348 (U.S. March 21, 2018).

II, 136 S.Ct. at 1279, 1283. That should be regarded as the law of the case deciding the matter.

B. The Board Waived the Ability to Challenge *Nevada v. Hall*

As explained above, the Board had the opportunity to ask this Court to reconsider *Nevada v. Hall* when this case was before it in 2003. Although the Board had asserted sovereign immunity from the outset of this litigation, the Board made the express decision to not ask this Court to overrule *Nevada v. Hall*. As the Court explained in its unanimous ruling: "Petitioner does not ask us to reexamine that ruling [*Nevada v. Hall*], and we therefore decline the invitation of petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

The law is clear that if an argument is not raised in a petition for certiorari, it is deemed waived. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996); *see also Tennessee Student Ass'n Corp. v. Hood*, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting). This is in accord with the general rule that a party waives an argument by choosing not to raise it. *See, e.g., Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived" (quoting this Court's Rule 15.2) ("briefs in opposition")); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived).

The Board decided to challenge *Nevada v. Hall* only after lengthy proceedings in state court, including a jury trial, and after aspects of the jury's verdict were affirmed by the Nevada Supreme Court. *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 130-131 (Nev. 2014). As explained above, Hyatt participated in this protracted litigation in reliance on *Nevada v. Hall* and his knowledge that the Board was not asking it to be overruled.

The Board may argue that it can raise sovereign immunity at any time in the proceedings and that should include the ability to argue for the overruling of *Nevada v. Hall*. But this Court long has been clear that a state may waive its sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (observing that sovereign immunity "is a personal privilege [that the state] may waive at pleasure"); *see also Raygor v. Regents of the Univ.*, 534 U.S. 533, 547 (2002); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Moreover, this Court, and Courts of Appeals across the country, have held that a state can be deemed to waive its sovereign immunity by its choices during litigation. *See, e.g.*, *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388-390 (1998); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50 (1st Cir. 2002) ("Claims of waiver of immunity are like any other legal argument and may themselves be waived or forfeited if not seasonably asserted."); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) (waiver found based on participating in litigation). As Justice Kennedy observed, "[i]n certain

respects, the [sovereign] immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*." *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

When this case was first here, the Board tried to have the case against it dismissed, but without asking this Court to reconsider *Nevada v. Hall*. *See Hyatt I*, 538 U.S. at 491-492. It could have done so, but expressly said it was not asking for reconsideration of this precedent. Thus, it should be seen as waiving this argument in litigation before this Court.

II. *Nevada v. Hall* Should Not Be Overruled

A. The Strong Presumption Against Overruling Precedent

On the merits, the sole issue presented in this case is whether this Court should overrule its almost 40-year-old precedent in *Nevada v. Hall*. "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S.164, 172 (1989) (citations omitted). That is because "*stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Board, though, offers no compelling reason why *Nevada v. Hall* should be overruled.

B. *Nevada v. Hall* Safeguards a State's Sovereign Power Under the Tenth Amendment in Protecting Its Own Citizens From Harm

The Board and its *amici* stress a state's sovereign interest in not being sued. But they ignore another very important sovereign interest of states: providing a forum for their citizens when they are injured and providing a remedy for them, especially when none other exists. This Court repeatedly has recognized "the legitimate and substantial interest of the State in protecting its citizens." *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977); *see also Watson v. Employers Liability Assurance Corp.*, 348

U.S. 66, 72-73 (1954) (interest of state in protecting its citizens when they are injured). The "States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens." *Rosenbloom v. Metromedia*, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting).

Nevada v. Hall was expressly based on this interest of a sovereign state in being able to protect its citizens. As this Court explained, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign[.]" *Nevada v. Hall*, 440 U.S. at 416.

The Board speaks of the "dignity" interest of states in not being sued, Brief for Petitioner at 38, but fails to recognize the dignity interest of a state in being able as a sovereign to determine the jurisdiction of its own courts and to protect its own citizens from harm. In this case it is the interest of Nevada in protecting its citizens from egregious intentional torts, behavior sufficiently outrageous that it caused the jury to award $389 million in damages against the Board, including $250 million in punitive damages. As this Court approvingly quoted in *Hyatt I*: "'Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power.'" 538 U.S. at 495 (quoting *Pacific Employers Ins.*

Co. v. Industrial Accident Comm'n, 306 U.S. 493, 503 (1939)). As Chief Justice Roberts explained in *Hyatt II*: "[T]here is no doubt that Nevada has a 'sufficient' policy interest in protecting Nevada residents from such injuries." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting).

Since early in American history, the Court has recognized the limits of the political process when a state harms those in other states. In *McCulloch v. Maryland*, Chief Justice John Marshall explained that one reason Maryland could not tax the Bank of the United States was because Maryland then effectively would be taxing those in other states who do not have representation in the Maryland political process. 17 U.S. (4 Wheat.) 316, 435 (1819). Likewise, the Court has "a virtually per se rule" against laws discriminating against out-of-staters when such laws burden interstate commerce because a state is inflicting harms on others who are not able to protect themselves in the state's political process. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). As the Court explained in *South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938), "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

Similarly, a Nevada resident who is injured by the State of California has no possible remedy except in

the Nevada courts. As Chief Justice Roberts explained, "Nevada is not, however, required to treat its sister State as equally committed to protection of Nevada citizens." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting). Nevada, as a sovereign state has a crucial interest in ensuring the protection of its citizens. The Nevada Supreme Court said this explicitly in this case, declaring: "This state's policy interest in providing adequate redress to Nevada citizens is paramount." 335 P.3d at 147.

The Board posits that sovereign immunity serves the "constitutional values" of protecting the dignity of states and promoting self-government. Brief for Petitioner at 36-37. Both of these constitutional values, though, are directly served by allowing a state to provide a forum for their citizens when they are injured. *See Hyatt I*, 538 U.S. at 494 (The State of Nevada "is undoubtedly competent to legislate" concerning "intentional torts . . . which . . . have injured one of its citizens within its borders."). It affirms the dignity and autonomy of a state to be able to determine the jurisdiction of its courts and to provide a remedy for its citizens when they are hurt, especially within their own state. As Professor Weinberg explains, "[w]ithout *Nevada v. Hall*, a state's own residents cannot obtain justice for injuries received at the hands of a different state intruding on the home state's own territory." Weinberg, *Saving* Nevada v. Hall (November 12, 2018 draft), Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254349 (providing Abstract, View, and Download), at 19.

Additionally, citizens' interest in self-government is harmed when a state loses its ability to determine the jurisdiction of its courts and to provide its own citizens a remedy.

The Board focuses on the ability of a state to avoid being sued, but the flip side presents an even more important self-governance issue: the ability of citizens, through their representatives and judges, to protect the interests of those injured within the state by providing them a forum for redress. This case illustrates the importance of Nevada's interest. Agents from another state entered Nevada, spied on Hyatt in his home and searched his trash bins. They called him filthy names and tried to extort money from him by threatening to reveal private information. Without *Nevada v. Hall*, a state would have no way of protecting its residents who are harassed by employees of another state.

The Board and its *amici* fail to recognize this interest. They stress the harms to states of being sued. Although *Nevada v. Hall* is almost four decades old, they can point to only a relative handful of suits against state governments pursuant to it. Brief for Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14; Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioners at 17-18. Suits against states in state court—rare before the decision in *Nevada v. Hall*—are still rare today. *See* Jeffrey W. Stempel, Hyatt v. Franchise Tax Board of

California: *Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury*, 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive.").

Moreover, *Nevada v. Hall* does not mean that states are without protection from suit in other states' courts. As this Court held when this case was last before it, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. This matters greatly in protecting state governments. In this case, the jury's award of $139 million in compensatory damages and $250 million in punitive damages now has been reduced to $100,000. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017). States thus have ample means of "avoiding [the] burdens" of being haled into another state's court, Brief for Petitioner at 35, without abrogating their ability to protect their own citizens and contradicting fundamental principles of sovereignty.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that negligent claims could not go forward and also that punitive damages are not available against the Board because of considerations of comity. *Id.* Furthermore, in those relatively infrequent instances

when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister states, as the Nevada Supreme Court did here. *See, e.g.*, *Cox v. Roach*, 723 S.E.2d 340, 344-347 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761, 762-763 (N.M. 2006).

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause.").[4]

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[4] The Brief of the *Amici Curiae* Multistate Tax Commission, et al., also argues that *Nevada v. Hall* should be overturned because it subjects states to erroneous choice-of-law decisions of other state courts and risks disruption of states' tax enforcement systems. Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioner at 5-11. But states are not left without recourse if they feel the judgment of a sister-state court has been made in error. This Court has recognized that "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no

C. *Nevada v. Hall* Reflects the Original Understanding that a Sovereign Could Be Sued in Another Sovereign's Courts

The core of the arguments from the Board and its *amici*—besides that state governments don't want to be sued—is that *Nevada v. Hall* was wrong. There is no new historical evidence that suggests that the Court erred. The Board and its *amici* present the same historical arguments that were made in 1977 when the Court decided *Nevada v. Hall*.

This Court has been clear that "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). Rather, "[t]o reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Id.* (citations omitted). But no such special justification exists here. *Nevada v. Hall* was based on careful historical analysis. *See Nevada v. Hall*, 440 U.S. at 414-417.

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authority." *Baker v. GMC*, 522 U.S. 222, 235 (1997). Additionally, the defendant state may be able to reject the judgment for lack of subject matter jurisdiction, lack of personal jurisdiction, or other invalidating grounds such as fraud, as long as those issues were not litigated in the original forum state. *See* James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. Tex. L. Rev. 400, 407 (2009). And if states wish, they can enter into agreements limiting their ability to be sued in each other's courts.

The primary argument advanced by the Board and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Brief for Petitioner at 14-30. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v. Hall*: the difference between a state's sovereignty in its own courts and its immunity in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. California plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. *Nevada v. Hall*, 440 U.S. at 411. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada. *Id.*

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. *Id.* at 426-427. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. *Id.* at 414-417. The Court explained that sovereign immunity means that

> no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign;

> its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

Id. at 416.

Relying on precedent from the earliest days of American history—Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)—this Court in *Nevada v. Hall* concluded that sovereign immunity never was meant to protect a state from suits in another state's court. *Nevada v. Hall*, 440 U.S. at 416. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822); *see also* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity." (quoting *Nevada v. Hall*, 440 U.S. at 414)).

The Board argues that this Court got it wrong in *Nevada v. Hall* in relying on *The Schooner Exchange v.*

McFaddon because that case involved the immunity of nations and not of states. Brief for Petitioner at 33. For many reasons this Court's invocation of *The Schooner Exchange* in *Nevada v. Hall* was apt. To begin with, *The Schooner Exchange* established the power of a state to define the jurisdiction of its courts and to provide a remedy to its injured citizens against out-of-staters. *See* 11 U.S. (7 Cranch) at 144. That, of course, is exactly why *Nevada v. Hall* invoked *The Schooner Exchange* as precedent.

The Schooner Exchange also established the lack of immunity that a sovereign has when it is sued in the courts of another sovereign. *See id.* 146-147. As Justice Thomas stated: "[I]mmunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

Moreover, the crucial fact that the Board points to—"the absence of an enforcement mechanism"—also is true if this Court were to overrule *Nevada v. Hall*. There would be no enforcement mechanism of any kind for those like Gilbert Hyatt who have been injured by another state government. The "neutral tribunal" of this Court that the Board asserts to be the "judicial enforcement mechanism" that compensated the states for depriving them of "the ability to refuse to recognize the judgment of another state," Brief for Petitioner at 32, applies only to cases between state governments. Hyatt cannot sue the Board in this Court, nor in any other forum apart from Nevada.

Nevada v. Hall was based on three basic and unassailable premises. First, prior to formation of the Union, the states were independent sovereign nations and had the same immunity in each other's courts as other sovereign nations had in the courts of foreign nations. *See Nevada v. Hall*, 440 U.S. at 417. Second, before the founding of the United States, sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation. *See id.* at 416. Third, nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states, giving priority to the rights of visiting states at the expense of host states. *See id.* at 421. As Professors Stephen E. Sachs and William Baude observe: "The Constitution left sister-state immunity alone, neither abrogating it nor transforming it into a rule of constitutional law." Brief of Professors William Baude and Stephen E. Sachs as *Amicus Curiae* in Support of Neither Party, at 6. As Professor Louise Weinberg explained: "[B]oth in history and law, *Nevada v. Hall* is in accord with general understandings and cannot be disturbed without damage to the 'seamless web' of established legal understandings." Louise Weinberg, at 3-4.

The Board asserts that "[b]efore the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts." Brief for Petitioner at 21; Brief of Law Professors as *Amici Curiae* in Support of Petitioners at 9-10. But this is not correct and the Board itself admits this later in its brief when it states: "In the pre-ratification era, the relationship among States

was similar to that among independent nations. *No state could be required to respect another's sovereign immunity in its courts.*" Brief for Petitioner at 31-32 (emphasis added).

The Board's initial conclusion, which it later rightly contradicts, was based on generalizing from two cases from Pennsylvania in the unique context of admiralty law—*Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781); *Moitez v. South Carolina*, 17 F. Cas. 574, Pa. Adm. 1781 (No. 9,767). *See also* Brief of Law Professors as *Amici Curiae in Support of Petitioner* at 10-11 (relying on these cases as the basis for its analysis). Under the Articles of Confederation, however, there was no limit on the ability of a state to be sued. In *Chisholm v. Georgia*, Justice Cushing explained that *before* the ratification of the Constitution, states were subject to suit in the courts of other states. 2 U.S. (2 Dall.) 419, 474 (1793). He observed that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield *to her, or to her citizens*[.]" *Id.* (emphasis added). In fact, out of the original thirteen colonies, only two directly opposed jurisdiction over state governments. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002).

Nathan v. Virginia, invoked by the Board, reflected a common law immunity. 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). But the Board and its *amici* offer no evidence that the framers meant to turn this common law immunity against a state being sued in another state into a constitutional rule. As Professors Sachs

and Baude point out: "The Board repeatedly confuses the Founders' choice *not to abrogate* sovereign immunity with a decision *to entrench it*, transforming the traditional common-law immunities into new rules of constitutional law." Amicus Brief of Professors William Baude and Stephen Sachs, at 11.

This is why the Board is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Brief for Petitioner at 36-37. *Alden v. Maine* is about the ability of a state to choose to not be sued in its own state courts, a choice that this Court said was protected by an immunity that has existed throughout American history. *Alden*, 527 U.S. at 738. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another*[.]" 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated:

> In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here—that the Constitution reserves to the States a constitutional immunity from private

> suits in their own courts which cannot be abrogated by Congress.

Id. at 739-740. There is an enormous difference in terms of the intrusion on state sovereignty between forcing a state court to hear a case against its state government, what *Alden* protects state courts from having to do, and precluding a state court from hearing a suit to protect its citizens against another state. The Board relies heavily on *Alden* as the reason why *Nevada v. Hall* should be overruled, but then ignores the reasoning in *Alden* and this fundamental distinction which *Alden* expressly recognizes.

The Board and its *amici* stress state sovereignty, but keeping a state from hearing suits is itself a significant limit on state prerogatives. In *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state sovereignty. *Nevada v. Hall*, 440 U.S. at 426-427. The Court declared:

> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.

Id.

The Tenth Amendment is crucial in explaining the distinction between *Alden v. Maine* and *Nevada v. Hall*. Because the Constitution is silent about the power of state courts to hear suits against state governments, *see Nevada v. Hall*, 440 U.S. at 421, a state may make the choice—as Maine did in *Alden v. Maine*—to not allow itself to be sued in its state courts. But a state also may choose, as Nevada did here and as California did in *Nevada v. Hall*, to provide a forum for its citizens when they are injured by another state. As this Court recently noted in discussing the Tenth Amendment, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018) (citations omitted). An aspect of that sovereignty is being able to determine the jurisdiction of its courts and to choose to allow its courts to hear claims by its citizens who have been injured, including by other states. *See Nevada v. Hall*, 440 U.S. at 426-427.

The Tenth Amendment means that a state has the power to act unless prohibited by the Constitution. There is nothing in the Constitution that forbids a state from providing a forum for its citizens when they are injured by another state. *See id.* at 426-427. Nor is there anything in the framers' intent or original understanding at the time the Constitution was adopted that indicates that such a prohibition on state prerogatives was intended. As this Court explained in *Nevada v. Hall*, "the question whether one State might be subject to suit in the courts of another State was apparently

not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. To be sure, there are many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state or a *constitutional* limit on the ability of a state to choose to provide a forum for its citizens when they are injured by another state.

The Board asserts that decisions about sovereign immunity since *Nevada v. Hall* undermine its reasoning. Brief for Petitioner at 40-43. But this Court's decisions about sovereign immunity in federal courts are about the scope of a constitutional limit on federal court jurisdiction: the Eleventh Amendment. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (discussing the meaning of the Eleventh Amendment as a limit on federal judicial power and on congressional authority to abrogate sovereign immunity in federal court). Unlike the limits the Constitution places on Congress's powers, including its power to abrogate state sovereign immunity, the Constitution places no similar limits on the ability of states to create a forum for their citizens when they are injured in the state. *See Nevada v. Hall*, 440 U.S. at 426-427. Moreover, as discussed above, *Alden v. Maine* is about whether a state court is constitutionally required to hear suits against that state government. *Alden*, 527 U.S. at 738. The issue in this case is very different; it is about whether there is a *constitutional prohibition* on a state court choosing to provide a forum for its citizens when they are injured by another state. *Nevada v. Hall*

resolves this question and no subsequent case addresses it.[5]

The Board suggests that it "strains credulity" to believe that the framers would have allowed a state to be sued in another state's courts. Brief for Petitioner at 27. It does not strain credulity at all to believe that the framers assumed and even wanted to protect the sovereign prerogative of states to define the jurisdiction of their own courts, including by continuing to provide a forum for their citizens when injured.

The Board seeks to turn a power of a state to choose not to hear cases against itself as recognized in *Alden v. Maine*, 527 U.S. at 739-740, into a constitutional prohibition against states choosing to make their courts available to protect their residents when they have been injured. Nothing in the Constitution or

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[5] The Board raises the sovereign immunity of Indian tribes as a basis for finding that states have sovereign immunity and cannot be sued in the courts of other states. Brief for Petitioner at 14, 41-42. But this Court has long recognized that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Unlike the Board's characterization of tribal immunity, this Court said that "it developed almost by accident." *Kiowa*, *Id.* at 756. In fact, this Court noted that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. Also, the scope of tribal immunity remains uncertain. In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 799 n.8 (2014), the Court specifically declined to consider (and stated that it had never previously addressed) "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."

the framers' intent—and nothing cited by the Board or its *amici*—supports the conclusion that such a constitutional limit exists on state power.

In *Hyatt II*, this Court reiterated that

> the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

136 S.Ct. at 1285-1286 (citation omitted). That is why in *Hyatt I*, this Court held that the Nevada court was not required to extend full faith and credit to California's statute conferring complete immunity on California agencies. 538 U.S. at 494. But the Board's sovereign immunity argument here would allow California to substitute its legislative judgment for the judgment of other states in the same way that this Court held that the Full Faith and Credit clause does not permit. Essentially, the Board is arguing that the California legislature was entitled to waive immunity or not, but whichever way it decided, its judgment is binding on other states. That result would indeed disrupt "the very nature of the federal union of states."

The Board argues that *Nevada v. Hall* was a significant departure from precedent. Brief for Petitioner at 28-29. But notably it did not overrule a single decision of this Court and saw itself as following

the long-standing understanding that a state court can choose to hear suits against another state government.

D. There Is No Compelling Reason for Overruling *Nevada v. Hall*

The sole issue in this case is whether there is a "compelling justification" for overruling *Nevada v. Hall*. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of stare decisis without some compelling justification."). In terms of reconsidering precedent, this Court has explained:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have

> robbed the old rule of significant application or justification.

Planned Parenthood v. Casey, 505 U.S. 833, 854-855 (1992) (citations omitted).

Under each of these criteria, there is no justification for overruling *Nevada v. Hall*. First, *Nevada v. Hall* has not proven "intolerable simply in defying practical workability." The Board says that the impracticality of *Nevada v. Hall* is reflected in the jury's large verdict against it and the length of this litigation. Brief for Petitioner at 44. But the large jury verdict reflects the egregious conduct of the Board and the length of the litigation is a result of the choices of the Board, including choosing to make three trips to this Court as Petitioner. Furthermore, the jury verdict has been reduced to $100,000, showing the protections for state governments that the Board seeks. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017).

The Board and its *amici* point to a handful of cases brought against state governments. Brief for the Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. But the fact that states are occasionally sued does not show that *Nevada v. Hall* defies practical workability. Quite the contrary, it shows that *Nevada v. Hall* is working exactly as it should: allowing states to provide a forum when their citizens are injured by other states. Neither the Board nor its *amici* ever show that these are non-meritorious suits or that if they were, they could not be dismissed like any other non-meritorious litigation.

Admittedly, states do not like to be sued; no one does. But as noted above, states that conclude that litigation against each other is problematic have a fix: they can enter into a mutual agreement to not allow such litigation in their courts. When there is a solution to a problem that is readily available by action by elected officials, this Court should resist intervention in what is fundamentally a political decision. That states have not yet chosen to do so is certainly not reason to overrule *Nevada v. Hall*. The failure of states to enter into such compacts precluding litigation perhaps reflects that such suits are relatively rare and the judgment of the states that it is important to have their courts available to provide redress for their citizens when injured by agents of another state.

Second, the Board is wrong in its assertions that rules governing sovereign immunity do not engender reliance interests and that there has been no reliance on *Nevada v. Hall*. Brief for Petitioner at 43. Gilbert Hyatt has relied, at enormous cost, on *Nevada v. Hall* in litigating this matter for 20 years. Nor is he alone. The Board and its *amici* point to other cases that have been brought in reliance on *Nevada v. Hall*. *Id.* at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. The Board and its *amici* cannot have it both ways: they cannot simultaneously claim that there are a number of lawsuits based on *Nevada v. Hall* and assert that no one has relied on *Nevada v. Hall*. The plaintiffs in all of the suits identified by the Board and its *amici* have incurred great costs in litigation in reliance on this

Court's decision—and they would be potentially liable for having to pay the other sides' litigation costs if this Court were to hold that *Nevada v. Hall* is overruled.[6]

Third, there has been no change in the law that "has left the old rule no more than a remnant of

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[6] It is for this reason that there is a strong argument that if this Court were to overrule *Nevada v. Hall*, it should do so prospectively only. Those, like Hyatt, who have relied on this Court's decision in *Nevada v. Hall*, should not be penalized for doing so. This Court has recognized that the Constitution neither compels nor prohibits the retroactive application of its newly announced rules. *See, e.g., Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) (holding that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), this Court indicated that a decision should not be applied retroactively when it establishes a "new principle of law," including by "overruling clear past precedent" on which litigants relied, when applying a decision only prospectively would not lessen its impact in the future, and when there has been great reliance on a Court's prior decision.

All three of these factors counsel against a retroactive change in the law. Overturning *Nevada v. Hall* would clearly establish a new principle of law because it would overturn long-standing past precedent. As for the second factor, overruling *Nevada v. Hall* only prospectively will not lessen the impact of the Court's decision in the future. Finally, as to the third factor, Hyatt relied upon *Hyatt I*, in which the Court ruled to continue the litigation in Nevada state courts. In reliance on this Court's ruling and *Nevada v. Hall*, there was a jury trial and an appeal by the Franchise Tax Board from the verdict in favor of Hyatt. Hyatt relied on this Court's decision in *Hyatt II*, in which the Court directed the Nevada courts on how to address the tort damages issue. Hyatt has engaged in extremely lengthy and highly costly proceedings, as the plaintiffs did in *Chevron*. *Id.* at 108. Although the presumption is in favor of retrospective application, in this instance any decision to overrule *Nevada v. Hall* should only be prospective.

abandoned doctrine." The Board argues that this Court has significantly changed the law of sovereign immunity and especially points to *Alden v. Maine*. Brief for Petitioner at 17, 23, 36-37. But again, no decision of this Court has questioned the distinction explicitly drawn in *Alden v. Maine* between a state being sued in its own state courts and a state being sued in another state's courts. 527 U.S. at 739-740. As explained above, there is a crucial difference between forcing a state court to hear a suit against its state government and precluding a state court from choosing to hear a suit to protect its citizens. This Court's Eleventh Amendment decisions address a constitutional limit on federal court power. They do not address, explicitly or implicitly, whether there is a constitutional prohibition on a state's choice to provide a forum for its citizens when they are injured by another state. Most of all, they do not establish a limit on a state's power under the Tenth Amendment to define the jurisdiction of its courts and to provide a remedy to its citizens when they are injured by agents of another state.

Finally, the facts have not "so changed . . . as to have robbed the old rule of significant application or justification[.]" *Casey*, 505 U.S. at 855. There has been no change in facts since *Nevada v. Hall* was decided almost four decades ago. Every argument made by the Board and its *amici* against the conclusion of *Nevada v. Hall* could have been made then. *Nevada v. Hall* was based on the text and history of the Constitution and its protection of the ability of sovereign states to allow jurisdiction in their courts to protect their citizens.

Nothing has changed since then to undermine this basic power of states that is protected by the Tenth Amendment.

CONCLUSION

For all of these reasons, the judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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No. 17-1299

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Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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IN THE

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No. 17-1299

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

The difficulty of defending *Nevada* v. *Hall*, 440 U.S. 410 (1979), is evident from Hyatt's efforts to avoid a ruling on the question presented. He devotes pages to urging the Court to dismiss the writ of certiorari as improvidently granted, on the basis of supposed vehicle problems. But Hyatt waived those arguments by not raising them in his brief in opposition, and they are meritless.

When Hyatt finally reaches the question presented, he has no meaningful response to the FTB's brief. He claims the FTB ignores the States' interest in adjudicating disputes within their territories. But the FTB's brief recognizes that interest and explains (at 34-35) why it is outweighed by the States' interest in not being haled into other States' courts, as it was in the

Founding era. Hyatt also argues that the Framers did not intend to give interstate sovereign immunity constitutional (as opposed to common-law) protection. But he cannot account for this Court's repeated holdings that state sovereign immunity derives from the federal nature of the union established by the Constitution. Finally, Hyatt invokes *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Yet he cannot explain why *The Schooner Exchange* is relevant to interstate sovereign immunity, since the Court's holding in that case reflected the absence of a supranational tribunal that could enforce one nation's immunity against another—a defect the Constitution remedied in the interstate context by creating this Court.

Hyatt concludes by arguing that *Hall* should be preserved even if it is incorrect. But considerations favoring stare decisis are at their weakest here. *Hall*'s reasoning has been undermined by later decisions; *Hall* impairs the States' dignity and self-government interests; and *Hall* has engendered no meaningful reliance. There is every reason to overrule *Hall* and no reason to preserve it merely for the sake of consistency.

ARGUMENT

I. THERE IS NO REASON TO DISMISS THE WRIT OF CERTIORARI

Hyatt argues (at 18-28) that law of the case and waiver make this case a poor vehicle to resolve the question presented. But Hyatt waived those arguments by not raising them in his brief in opposition, and

they are meritless. And precedent forecloses amici's arguments that the Court lacks jurisdiction.[1]

A. This Court's Rule 15.2 provides that any non-jurisdictional "objection to consideration of a question presented ... may be deemed waived unless called to the Court's attention in the brief in opposition." The Court routinely enforces that rule. *See, e.g., Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 930-931 (2011); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011). And although an issue not raised in the brief in opposition may be addressed if it is a "predicate to an intelligent resolution of the question presented," *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted), that is not true here: The question presented is independent of Hyatt's law-of-the-case and waiver arguments and can be decided without addressing them. Hyatt's arguments are thus "properly 'deemed waived.'" *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Furthermore, Hyatt presents no information of which the Court was unaware. The petition explained (at 24-26) that the Court's equal division in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016), on whether *Hall* should be overruled did not create law of the case. The petition also noted (at 5)

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[1] Hyatt also presents a misleading account of the facts in an effort to dissuade the Court from resolving this case. For example, he accuses an FTB employee of anti-Semitism (at 2), but his witness for that point was a former FTB employee who had charged the FTB with wrongful termination, provided "consultant services" to Hyatt, and eventually claimed Hyatt "misrepresented" her testimony; other witnesses denied hearing the alleged anti-Semitic remarks. JA265, 268-270, 283-288, *Franchise Tax Bd. of Cal.* v. *Hyatt*, No. 14-1175 (U.S. Sept. 3, 2015).

that the FTB "had not asked for *Hall* to be overruled" in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). The Court granted review even though it was aware of both potential concerns; there is no reason to revisit those issues now. *See United States* v. *Williams*, 504 U.S. 36, 40 (1992).

B. In any event, neither contention is meritorious.

1. The Court's equal division in *Hyatt II* does not prevent the Court from reconsidering *Hall* now. Although affirmance of a lower court's final judgment by an equally divided Court is "conclusive and binding upon the parties," *United States* v. *Pink*, 315 U.S. 203, 216 (1942), that merely means the judgment has res judicata effect in subsequent litigation between the parties, *see, e.g.*, *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1869). The Court has never held that its equal division on an issue at an interlocutory stage of a case prevents it from revisiting that issue later in the same case. To the contrary, the law-of-the-case doctrine applies only "when a court decides upon a rule of law," *Arizona* v. *California*, 460 U.S. 605, 618 (1983), and an equally divided Court does *not* decide on a rule of law, *see Neil* v. *Biggers*, 409 U.S. 188, 192 (1972).

Moreover, the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own ... in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Questions bearing on a court's authority to decide a case (like the question here) are more "likely to be reconsidered" than others, "because of their conceptual importance" and the degree to which they are "affected with a pub-

lic interest." 18B Wright et al., *Federal Practice & Procedure* § 4478.5 (2d ed. 2017 Supp.). And law of the case does not prevent a court from "depart[ing] from a prior holding" that "is clearly erroneous and would work a manifest injustice," *Arizona*, 460 U.S. at 618 n.8, including where a controlling precedent "would be decided differently under [the Court's] current" jurisprudence, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Finally, by deciding the question presented, the Court would not be upsetting *Hyatt II* in any but the most formalistic sense; it would be rendering a decision where it previously could not. That would hardly offend the finality and judicial economy considerations animating law-of-the-case doctrine.

2. Hyatt's argument that the FTB waived its challenge to *Hall* fares no better. Hyatt does not argue the FTB failed to preserve its challenge in the Nevada courts. He recognizes (at 26)—and the petition demonstrates (at 22-23)—that the FTB "asserted sovereign immunity from the outset." Rather, Hyatt faults the FTB for not asking this Court to reconsider *Hall* in *Hyatt I*. That argument fails for three reasons.

First, the FTB had good reason not to ask the Court to overrule *Hall* in *Hyatt I*. *Hall* had reserved the question whether "a different analysis or a different result" might obtain in a case involving core "sovereign responsibilities" or a "substantial threat to our constitutional system of cooperative federalism," 440 U.S. at 424 n.24, and in *Hyatt I* the FTB argued that this is exactly such a case, *see* Pet'r Br. 14-31, *Hyatt I*, No. 02-42 (U.S. Dec. 9, 2002). Only once the Court rejected that argument, *Hyatt I*, 538 U.S. at 498, did the FTB have no choice but to ask that *Hall* be overruled. It did so at the next available opportunity.

Second, no rule requires a party to present arguments to this Court in an interlocutory posture, so long as the party preserves those arguments for later review. This Court has repeatedly held that "[a] petition for writ of certiorari can expose the entire case to review." *Christianson*, 486 U.S. at 817 (citing *Panama R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897)); *see also, e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258-259 (1916). Hyatt's cases (at 26) are not to the contrary. They hold only that an argument not presented at the certiorari stage cannot be raised at the merits stage—exactly the rule that prevents Hyatt from raising his current vehicle concerns.

Third, even if the FTB had not diligently preserved its sovereign immunity argument, this Court has never held that sovereign immunity can be lost by a State's mere "'failure to raise the objection at the outset of the proceedings.'" *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 547 (2002). To the contrary, sovereign immunity may be raised on appeal even if not raised below. *Edelman* v. *Jordan*, 415 U.S. 651, 677-678 (1974). Hyatt argues (at 27-28) that sovereign immunity is *waivable*. But a State *waives* sovereign immunity when it "voluntarily invokes" the jurisdiction of a court in which it is allegedly immune or makes a "'clear declaration'" of intent to submit to jurisdiction, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999), neither of which Hyatt claims the FTB did in the Nevada courts.

C. Professors Baude and Sachs offer two arguments that this Court lacks jurisdiction. Those arguments are unconvincing.

1. Amici argue (at 25) that the Court lacks statutory jurisdiction because this case involves no "title,

right, privilege, or immunity ... specially set up or claimed under the Constitution," 28 U.S.C. § 1257(a). But the FTB *has* "claimed" an "immunity" under the Constitution; it claims the Constitution renders it immune from this suit. Amici argue that a State has no constitutionally protected immunity in another State's courts, but that improperly assumes a negative answer to the question presented and conflates the jurisdictional inquiry with the merits.

In the analogous context of district courts' federal-question jurisdiction, "[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Rather, jurisdiction lies if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; *see also Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The same is true of § 1257, *see* 16B Wright et al., *Federal Practice & Procedure* § 4017 (3d ed.); the Court routinely addresses constitutional claims even if it rejects them on the merits. This Court therefore has statutory jurisdiction.

2. Amici also argue (at 27-34) that the Eleventh Amendment bars jurisdiction because this is a case by a citizen of one State against another State. But as amici acknowledge (at 32), that argument is foreclosed by two lines of precedent. The Court has "repeatedly" and "uniformly" held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 & n.9 (1990). Nor does it bar a federal court from proceeding where a State has invoked the

court's jurisdiction. *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618-619 (2002). Those were reasoned, conscious decisions—not the sort of "drive-by jurisdictional rulings" that "have no precedential effect," *Steel Co.*, 523 U.S. at 91—and the Court has declined prior invitations to overrule them, *see, e.g.*, *Lapides*, 535 U.S. at 620; *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 166 (1999). It should do so again.

II. States Are Constitutionally Immune From Suit In Each Other's Courts

On the merits, Hyatt offers no persuasive response to the FTB's arguments.

A. The *Hall* majority refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit terms of Article III and the Eleventh Amendment. 440 U.S. at 421, 426. But the Court has since repudiated the majority's mode of interpretation and endorsed the dissenters', *see id.* at 430 (Blackmun, J., dissenting); *id.* at 433 (Rehnquist, J., dissenting). It has held that state sovereign immunity is *not* limited to the explicit terms of the constitutional text; rather, States "retain" their pre-ratification immunity "except as altered by the plan of the Convention." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *see also, e.g.*, *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 753-755 (2002).

The historical record leaves little doubt that, before ratification, States were understood to be immune from suit in each other's courts. FTB Br. 21-22. And the participants in the ratification debates, who disagreed on much else, agreed that the Constitution would not render States more vulnerable to suit than they were

before. *Id.* at 23-25. That consensus was confirmed by the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); the States that ratified the Eleventh Amendment surely did not mean to "foreclose[] the neutral federal forums only to be left to defend suits in the courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting); *see also id.* at 431 (Blackmun, J. dissenting); FTB Br. 26-28. And it is further confirmed by pre-*Hall* decisions. FTB Br. 28-30. Because the Convention did not "alter[]" States' pre-ratification immunity in other States' courts, States "retain" that immunity today. *Alden*, 527 U.S. at 713.

B. Hyatt's responses mischaracterize the FTB's brief and the relevant precedents.

1. Hyatt attempts (at 41) to cast doubt on the historical consensus that, before ratification, States were immune from suit in other States' courts. As the FTB's brief explains (at 21-22), that immunity is evident from such cases as *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), and *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697). Hyatt suggests (at 41) that those cases reflected "the unique context of admiralty law." But *Nathan* was not an admiralty case; it was brought in Pennsylvania's Court of Common Pleas rather than its Admiralty Court, and the property at issue was "a quantity of cloathing" rather than a ship. 1 U.S. at 77. And although both cases were in rem proceedings, neither this Court nor scholars have understood them as limited to that context. *See, e.g.*, *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant"); Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994) (*Nathan* marked

"a decisive rejection of state suability in the courts of other states").[2]

Hyatt misreads the authorities on which he relies in disputing this historical consensus. He first quotes language (at 41) from what he says is Justice Cushing's opinion in *Chisholm*. The language is from Chief Justice Jay's opinion, not Justice Cushing's. More importantly, Chief Justice Jay did *not* suggest (as Hyatt claims) that before ratification States could be sued in other States' courts. To the contrary, his statement that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens," 2 U.S. at 474, is more naturally read to mean that a State and its citizens—lacking access to a neutral federal forum—could sue another State only in the defendant State's *own* courts. *Id.* That is clear from the opinion's account of why the Framers extended federal jurisdiction "[t]o controversies between a State and citizens of another State"—namely to give States or their citizens a neutral forum in which to sue a different State, rather than limiting them to suit in the defendant State's courts. *See id.* at 475-476.

Hyatt next relies on an article for the proposition that, "out of the original thirteen colonies, only two directly opposed jurisdiction over state governments."

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[2] The context of *Nathan* and *Moitez* only strengthens their implication that States were regarded as immune from suit in other States' courts. A court's exercise of in rem jurisdiction over property owned by a State offends the State's dignity less than the exercise of in personam jurisdiction over the State or its officials. This Court has held, for example, that States cannot assert sovereign immunity in certain admiralty actions against vessels they claim to own. *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501-508 (1998).

Br. 41 (citing Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002)). But the article claims only that by ratifying the Constitution, the States conceded they could be sued in *federal* court—not in another State's courts. *See* 81 Neb. L. Rev. at 54 ("The ratification documents of the majority of the states permit or compel the inference that the states understood that ... they ... were subject to suit by the terms of Article III, Section 2.").

2. Hyatt argues at length that even if States have a sovereignty interest in not being sued in other States' courts, they also have a sovereignty interest in adjudicating disputes that arise within their borders. He accuses the FTB (at 29, 33) of "ignor[ing]" or "fail[ing] to recognize" that interest. In fact, the FTB's brief recognizes (at 34) "that States have a sovereignty interest in hearing disputes that arise within their borders."

The brief goes on, however, to explain (at 34-36) that that interest must be reconciled with the States' countervailing interest in not being haled into other States' courts—and that when the two interests clash, the latter carries greater weight. That was true in the Founding era, when no one suggested that Pennsylvania's interest in adjudicating the ownership of property within its borders (in *Nathan* and *Moitez*) should trump Virginia's or South Carolina's right not to be haled into Pennsylvania's courts. *See* FTB Br. 21-22, 34. And it is true today, as demonstrated by the overwhelming number of States and state organizations that support overruling *Hall*. *See* Br. of Indiana and 43 Other States; Br. of Multistate Tax Comm'n, Nat'l Governors Ass'n, and Nat'l Conf. of State Legislatures.

Hyatt never explains why the States' interest in adjudicating disputes within their borders should pre-

vail when it clashes, as here, with the States' countervailing interest in not being haled into the courts of other States.[3]

3. Hyatt's next argument (at 41-42)—also articulated by Professors Baude and Sachs (at 8-11)—is that, by leaving untouched the States' pre-ratification immunity in the courts of other States, the Framers did not transform that immunity into a constitutional rule. Under that theory, interstate sovereign immunity remains a common-law rule that States may choose to abrogate. And, Hyatt argues (at 15-18, 44-45), because the Constitution does not forbid States from hearing suits against their counterparts, the Tenth Amendment preserves the power to do so.

But the Court has repeatedly described state sovereign immunity as constitutionally protected—including where it flows from structural principles rather than explicit constitutional text. *Alden*, for example, refers to the States' "constitutional immunity from suit," 527 U.S. at 727, and explains that "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design," *id.* at 733. In *Federal Maritime Commission*, the Court likewise explained that by choosing not to "disturb States' immunity from private suits," the Framers "firmly enshrin[ed] this principle in our constitutional framework." 535 U.S. at 752. And other decisions describe state sover-

[3] Nor does Hyatt explain why, if the States' power to adjudicate all suits within their borders is so important, this Court has repeatedly held that power must yield to the common-law immunity possessed by Indian Tribes, *see* FTB Br. 41-42. He simply criticizes the Court's tribal sovereign immunity jurisprudence (at 46 n.5).

eign immunity in similar terms. *See, e.g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-268 (1997) (immunity is "implicit in the Constitution"); *Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934) (recognizing that "[b]ehind the words of the constitutional provisions are postulates which limit and control," including "that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention'" (footnote omitted)).

Hyatt and his amici claim that *Alden* held "'the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another[.]'" Hyatt Br. 42 (quoting 527 U.S. at 738) (emphasis omitted); *see* Br. of Professors of Federal Jurisdiction 11. But *Alden* held no such thing; that is simply *Alden*'s description of *Hall*'s holding. Nor does it help Hyatt that the *Alden* Court regarded *Hall* as "consistent with" its holding, 527 U.S. at 739; for the reasons discussed above, overruling *Hall* would be far more "consistent with" *Alden*.

In short, this Court's prior decisions make clear that the Constitution protects the immunities States previously enjoyed as a matter of common law.

4. Hyatt invokes *The Schooner Exchange* (at 38-39) for the proposition that sovereigns may choose whether or not to respect other sovereigns' immunity in their courts. But as the FTB's brief explains (at 30-33), the Court's holding in that case simply reflects the absence of a supranational tribunal that could require one nation's courts to respect the immunity of another. *The Schooner Exchange* has no bearing on *interstate*

sovereign immunity, which is why no court cited it as relevant to that issue in the 167 years before *Hall*.

Hyatt claims (at 17, 40-41) that, by recognizing the lack of a judicial enforcement mechanism for interstate sovereign immunity in the pre-ratification era, the FTB contradicts its argument that States were immune from suit in other States' courts during that era. But the two points are consistent. Before the Constitution, the relationship among States was like that among nations; no State could be ordered to respect another's immunity in its courts. But that did not mean States lacked immunity in other States' courts, only that they lacked a judicial means to enforce that immunity if the forum State's courts refused to respect it.[4] *See* FTB Br. 31-32. Indeed, "[t]reatises on the law of nations"—including Vattel's canonical work—"widely recognized sovereign immunity as a limit on the power of one sovereign to adjudicate claims against another." Pfander, 82 Calif. L. Rev. at 583-584 (citing Vattel). The fact that nations could elect to disregard that limit, and bear the diplomatic or martial consequences, did not mean the limit was illusory. *See, e.g.*, Bellia & Clark, *The Political Branches and the Law of Nations*, 85 Notre Dame L. Rev. 1795, 1804-1805 (2010) (*The Schooner Exchange* "insisted that the political branches—rather than the courts—make the decision to override the immunity").

Contrary to Hyatt's amici, Br. of Professors of Federal Jurisdiction 9, no one contends that creation of this Court *expanded* state sovereign immunity; it mere-

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[4] By the same token, constitutional rights are still rights even when they are not judicially enforceable. *See, e.g.*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

ly allowed judicial enforcement of the immunity States already possessed. Nor did it "displace pre-existing *state* authority over suits against other sovereigns," *id.* at 10, because—for the reasons discussed above and in the FTB's brief (at 21-22)—the States were understood to possess no such authority.[5]

Hyatt acknowledges (at 39) the FTB's argument that *The Schooner Exchange* reflects "'the absence of an enforcement mechanism'" among nations. But his response—that under the FTB's position, "[t]here would be no enforcement mechanism ... for those like Gilbert Hyatt who have been injured by another state government"—misses the point. The "enforcement mechanism" in question is a means for sovereigns to enforce their immunity against other sovereigns, not for a plaintiff to sue a sovereign.

Hyatt's references (at 17, 39) to a dissenting opinion in *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782 (2014), are equally unavailing. In the context of tribal sovereign immunity, that opinion recognized that "[s]overeign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another." *Id.* at 816 (Thomas, J., dissenting). Here, however, the FTB does not invoke sov-

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[5] Amici are wrong in other respects as well. They suggest (at 12-16) that the only way in which this Court can vindicate one State's immunity in another's courts is by entertaining a State-vs.-State suit in its original jurisdiction. In fact, this Court can do so by reviewing state-court decisions, as in this case. And although amici claim (at 6-7) that overruling *Hall* would call into question the Court's foreign-sovereign-immunity precedents, that is incorrect; one nation's sovereign immunity in the courts of another would remain a matter of comity even if the Court were to recognize the irrelevance of *The Schooner Exchange* in the interstate context.

ereign immunity as "a freestanding 'right'" or argue that it "applies of its own force," *id.*; rather, the FTB argues that by ratifying the Constitution, the States agreed to let this Court enforce their sovereign immunity in each other's courts. The dissent's skepticism about the existence of a rule of "federal or state law" extending tribal sovereign immunity to federal or state courts, *id.* at 816-817, thus has no bearing here.

C. Hyatt also offers a handful of policy arguments. They are unpersuasive, and in any event of course would not justify disregarding the constitutional plan.

1. Hyatt's principal argument (at 31-32) is that, if *Hall* were overruled, a citizen of one State could not obtain relief when injured by another State. But anyone injured by a State may sue the State in its *own* courts. *Cf.* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 290 ("refiling in the home state [is] a possibility in many cases" where one State refuses to entertain suit against another). States may choose not to waive their sovereign immunity against such suits, but that is equally true of suits brought by a State's own citizens. If *Hall* is overruled, the availability of suit against a State will be dictated by the State's *own* choices about waiving its sovereign immunity, rather than the choices of a *different* State.

Here, as the FTB's brief explains (at 39, 46), California has not generally waived sovereign immunity against claims "for or incidental to the assessment or collection of a tax," Cal. Gov't Code § 860.2. But it does allow two types of claims Hyatt could have pursued. Hyatt could have claimed the FTB had "recklessly disregard[ed]" its "published procedures," Cal. Rev. & Tax. Code § 21021(a), (b)(1), or violated the state informational privacy law, Cal. Civ. Code § 1798.45(c); *see*

Bates v. *Franchise Tax Bd.*, 21 Cal. Rptr. 3d 285, 295 (Ct. App. 2004) (§ 1798.45 allows suit notwithstanding § 860.2).

2. Relatedly, Hyatt argues (at 31) that the "political process" has "limits ... when a state harms those in other states." It is true that States lack the same political incentives to remedy harms against other States' citizens that they have to remedy harms against their own citizens. But the Constitution likely would not permit a State to allow its own citizens to sue for harms caused by the State while barring such suits by other States' citizens. *See, e.g.*, *McBurney* v. *Young*, 569 U.S. 221, 231 (2013) ("[T]he Privileges and Immunities Clause 'secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.'").

As the FTB's brief explains (at 37-39, 44-45), it is *Hall* that creates perverse incentives and undermines the proper operation of the political process. *Hall* allows a State's sovereign conduct and public policy to be called into question by a different State's judges and juries—who may have quite different policy preferences, and who certainly have no incentive to consider the burden a financial sanction would impose on the defendant State's taxpayers.

3. Hyatt further argues (at 34-35) that States can protect themselves notwithstanding *Hall*. Those protections are illusory, however, for the reasons explained in the FTB's brief (at 48-49). Although the FTB eventually benefited from the Nevada Supreme Court's exercise of comity and from this Court's holding in *Hyatt II*, those decisions came only after the FTB was dragged through years' worth of litigation in

the Nevada courts, at extraordinary monetary and dignitary costs.

Sovereign immunity is an immunity *from suit*, not just a defense to liability; it cannot be vindicated by uncertain protections that may require years of litigation to invoke. *See, e.g., Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (immunity serves "'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'"). Nor should States have to attempt the complex process of negotiating an interstate compact, when the Constitution—the original interstate compact—grants them the protection they need.

4. Finally, Professors Baude and Sachs hypothesize (at 19-22) that a judgment rendered by one State against another might not be enforceable in the defendant State. But as *Hall* recognized, it is black-letter law that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." 440 U.S. at 421.

Amici do not argue that one State's disregard for another's sovereign immunity would constitute a defect in personal or subject-matter jurisdiction. They instead suggest (at 19-21) that this portion of *Hall* "could be revisited in an appropriate case," and that the validity of one State's judgment against another could be measured under a line of early-nineteenth-century cases in which courts applied principles "of common law and the law of nations" to determine the validity of other courts' judgments. Amici recognize that line of cases was superseded a century and a half ago by the Due Process Clause, *see* Br. 21 (citing *Pennoyer* v. *Neff*, 95

U.S. 714, 732-733 (1878)), but argue that it could be resurrected for States, which lack due process rights.

It is hard to imagine a better illustration of the need to overrule *Hall*. The notion that this Court should not worry about depriving States of a straightforward immunity in other States' courts—on the theory that they could seek to resurrect an archaic and amorphous common-law standard, which would provide at best uncertain protection and require years of litigation to define its contours—proves the need to restore the clear rule the Framers intended to preserve.

III. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

As the FTB's brief explains (at 39-49), stare decisis poses no barrier to overruling *Hall*.

A. Hyatt relies (at 36) on *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), for the proposition that this Court does not "scrap[] settled precedent" simply because it "got something wrong," *id.* at 2409. But *Kimble*, like several other cases Hyatt invokes, involved the interpretation of a statute—and Hyatt fails to recognize that stare decisis has "special force in the area of statutory interpretation" because, "unlike in the context of constitutional interpretation, ... Congress remains free to alter" this Court's rulings. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *see also Kimble*, 135 S. Ct. at 2409.

In contrast, stare decisis "is at its weakest" for constitutional precedents, because—outside the possibility of a constitutional amendment—this Court alone can correct its prior errors. *Agostini*, 521 U.S. at 235. The Court "ha[s] held in several cases that *stare decisis* does not prevent [it] from overruling a previous deci-

sion where there has been a significant change in, or subsequent development of, [its] constitutional law" precedents. *Id.* at 235-236. And as the FTB's brief explains (at 40-43), this Court's later sovereign-immunity precedents have left *Hall* "behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992).

B. Hyatt argues (at 50-51) that litigants have made choices and incurred costs in reliance on *Hall*, but those are not relevant reliance interests. The precedents the Court is loath to overrule are those that have led people to alter their "primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*i.e.*, those that "serve as a guide to lawful behavior," *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). Rules that affect only "the bringing of lawsuits" or other litigation behavior do not affect "the sort of primary conduct that is relevant." *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).

Under Hyatt's theory, reliance interests would always preclude the Court from overruling a precedent, because by the time a case arrives at this Court the parties will always have expended time and money litigating it under existing precedent. That is not the law.

C. Hyatt's attempts (at 49-50) to diminish the harms associated with suits under *Hall* are unpersuasive. As the FTB's brief (at 44-45) and the States' amicus brief (at 12-19) explain, *Hall* exposes States to exactly the kinds of monetary and dignitary burdens that sovereign immunity is intended to avoid. *See Alden*, 527 U.S. at 750; *Puerto Rico Aqueduct*, 506 U.S. at 146. Hyatt argues (at 49) that the large judgment in this case was reduced after multiple appeals and that some of the litigation costs arose from the FTB's choices, "in-

cluding ... three trips to this Court." But California should never have had to choose between paying a nearly half-billion-dollar judgment and incurring the enormous costs necessary to defend itself.[6]

Hyatt also has no response to the harms *Hall* poses to States' dignity interests when they are haled into another State's courts against their will, or to their self-government interests when another State's courts pass judgment on their public policy. *See* FTB Br. 45-48. The fact that courts regularly exercise jurisdiction over such cases undermines any suggestion that comity can mitigate *Hall*'s threat to state sovereignty.

D. Finally, Hyatt makes a last-ditch suggestion (at 51 n.6) that, if *Hall* is overruled, it should be overruled only prospectively. But the Court's "general practice is to apply the rule of law [it] announce[s] in a case to the parties before [it]," "even when [the Court] overrule[s] a case," *Agostini*, 521 U.S. at 237, and Hyatt presents no reason to depart from that practice.

Hyatt's reliance on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), is unavailing, as that case was overruled (as relevant) by *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). *Harper* confirms that a new rule of federal law "must be given full retroactive effect in all cases still open on direct review." *Id.* Although Hyatt argues that his reliance on *Hall* warrants prospective-only application of any new rule announced here, the Court explained in *Harper* that it "can scarce-

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[6] As at the certiorari stage, Hyatt cites an article (at 33-34) for the proposition that litigation under *Hall* does not significantly burden States—and, again, he fails to disclose that the author was his retained expert. *See* Stempel, Hyatt v. Franchise Tax Board of California: *Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

ly permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (quotation marks and brackets omitted). There is no more reason to exempt Hyatt from a decision overruling *Hall* than in any case where the Court overturns precedent on which the litigants previously relied. Hyatt offers no basis to deny the FTB the protection of sovereign immunity.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF PROFESSORS WILLIAM BAUDE AND STEPHEN E. SACHS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

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SUMMARY OF ARGUMENT

This case presents the question whether to overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979). That question requires careful attention to the legal status of sovereign immunity and to the Constitution's effect on it, which neither *Hall* nor either party has quite right. The Founders did not silently constitutionalize a common-law immunity, *contra* Pet. Br. 35–36, but neither did they leave each State wholly free to hale other States before its courts, *contra* Br. in Opp. (BIO) 13–14. While *Hall*'s holding was mostly right, other statements in *Hall* are likely quite wrong—yet this case is a poor vehicle for reconsidering them.

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[1]All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to this brief, and the views expressed here are solely those of the *amici curiae*.) No other person or entity, other than the *amici curiae*, has made a monetary contribution intended to fund the preparation or submission of this brief.

1. *Hall* correctly held that States lack a *constitutional* immunity in sister-state courts. The Founders viewed each State as immune from such suits under the common law and the law of nations. Before the Constitution's enactment, this was plainly not a constitutional right, and nothing in the Constitution changed that. Thus, *Hall* properly rejected the argument that there is a "federal rule of law implicit in the Constitution that requires all of the states to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418.

A plain reading of the Constitution's text reveals no affirmative guarantee of sister-state immunity. Unless otherwise specified "in the plan of the convention," The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), the Constitution takes the States' sovereign rights as it finds them. The Founders left the rules of sister-state immunity precisely as they were: as ordinary rules of common law and the law of nations, to be enforced through ordinary channels. The Franchise Tax Board treats the Founders' broad support for sovereign immunity as evidence of its constitutional stature. Pet. Br. 23–28. But it is a "fundamental mistake" to "quote prominent Framers without investigating the legal basis for their conclusions." Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1653 (2002).

In essence, the Board argues that the issue is of constitutional significance, so it must be addressed somewhere in the Constitution—and that the Court has wandered from the text before, so it may as well do

so here. Pet. Br. 18–20, 34–39. That sells this Court's decisions short. The "fundamental postulates" of immunity recognized by this Court, *Alden* v. *Maine*, 527 U.S. 706, 729 (1999), are bona fide rules of common law, "backdrop" legal principles that the Constitution indirectly protects from federal abrogation. See generally Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017); Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1816–19, 1868–75 (2012). Article III simply declines to abrogate certain State immunities from suit, see *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Monaco* v. *Mississippi*, 292 U.S. 313 (1934), and Article I likewise declines to grant Congress an enumerated power to do so, see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996); *Alden*, 527 U.S. 706. Neither these refusals to grant additional powers to the Federal Government, nor the Eleventh Amendment's further restriction of the federal judicial power, impose any constitutional restraints on *State* governments—which retain every power "not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X.

2. *Hall* went too far, however, in denying that "the Constitution places *any* limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State," 440 U.S. at 421 (emphasis added), and in reducing sister-state immunity to a "matter of comity," *id.* at 425. In particular, *Hall* was likely wrong to assume that a State's abrogation of immunity in its own courts could be projected outward so as to bind other state and federal courts.

Even without a direct guarantee of sister-state immunity, the Constitution may well offer substantial indirect protection rooted in the law of judgments. Whatever a State's power to prescribe rules for its own courts, it cannot force *other* courts to take notice of "a jurisdiction which, according to the law of nations, [the] sovereign could not confer." *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 276–77 (1808). Early federal and state courts routinely refused full faith and credit to state judgments that exceeded the jurisdictional limits imposed by the law of nations and the common law. These same principles would provide ample protection for States today, shielding them from suit in sister-state courts without inventing a novel constitutional rule.

3. In an appropriate case, these principles might justify revisiting and narrowing portions of *Hall*. Yet this case is a poor vehicle for doing so.

A State threatened by suit in a sister-state court has many options, ranging from default to a federal action against the plaintiff to an original-jurisdiction action against the offending State. Each of these options might allow a federal court, including this Court, to enforce California's common-law immunity from suit.

The Board has done none of these things. Instead, it appeared in Nevada's courts, lost its state-court litigation, and then sought review in this Court on federal-question grounds. Yet sister-state immunity is not a rule of federal law that can support federal-question jurisdiction. And the Board's appearance may have waived its right to shield itself from the Nevada judgment under other heads of jurisdiction.

More urgently, on a faithful reading of the Eleventh Amendment's text, this Court's own subject-matter jurisdiction is in serious doubt. Gilbert Hyatt's suit against the Board is one "commenced or prosecuted against one of the United States by Citizens of another State"—to which "[t]he Judicial power of the United States," including the power vested in this Court, "shall not be construed to extend." U.S. Const. amend. XI. Though the Court has announced exceptions to the Eleventh Amendment in similar cases, these cases did not adequately address the Amendment's text and history. This issue is jurisdictional, and it would need to be reexamined *sua sponte* before the Court could reach the merits.

Because the case has been improperly framed by the parties and cannot be resolved properly without further briefing, the Court should dismiss the writ as improvidently granted. Alternatively, it should dismiss for lack of jurisdiction—or, if satisfied of its jurisdiction, should affirm.

ARGUMENT

I. The Constitution does not entrench sister-state immunity as a constitutional rule.

Hall rejected the argument that sister-state immunity was a "federal rule of law implicit in the Constitution." 440 U.S. at 418. It was correct to do so, and that part of *Hall* should not be disturbed.

This is not to deny the legitimacy and importance of sovereign immunity. This Court has properly recognized the States' "immunity from suit [as] a fundamental aspect of the sovereignty which [they] enjoyed before the ratification of the Constitution."

Alden, 527 U.S. at 713. Before the Constitution, however, sovereign immunity was not a rule of constitutional law, but rather of the common law and "the general law of nations" that protected the States as separate sovereigns. Nelson, *supra*, at 1574.

We are aware of no contemporaneous evidence that Ratification somehow transformed this unwritten immunity into a constitutional rule. Instead, the only debate at the Founding concerned whether Article III would empower federal courts to disregard the States' preexisting immunities. Alexander Hamilton, James Madison, John Marshall, and James Iredell all believed the Constitution did not affect the States' immunity to individual suits, and the Eleventh Amendment then "cut off" the only portion of Article III that even arguably spoke to the question. *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (argument of Attorney General Charles Lee). The Constitution left sister-state immunity alone, neither abrogating it nor transforming it into a rule of constitutional law.

While the States' immunities from suit do indeed extend more broadly than does the Eleventh Amendment, they do not rest on mysterious penumbras and emanations from the federal structure, nor on the unenacted hopes and dreams of the Founding generation, cf. *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323, 343 (2011) (Thomas, J., concurring in judgment). Instead, they rest on specific rules of law that the Constitution left alone. Those rules of law were indirectly preserved by the Constitution, but not constitutionalized; they persist through the *absence* of federal power to override them, and not through any affirmative constitutional guarantee.

A. Before the Constitution, sovereign immunity was a doctrine of common law and the law of nations.

Sovereign immunity was not invented by the Constitution. Long before the Philadelphia Convention, the thirteen original States were not amenable to each other's jurisdiction, and they could not be haled into each other's courts. The common law and the law of nations afforded them immunity from what we would now call personal jurisdiction: as sovereigns, they could not be subjected to compulsory process, and they could only be sued by consent. See Nelson, *supra*, at 1565, 1568, 1574; Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 559, 583 (1994); cf. 4 William Blackstone, Commentaries on the Laws of England *67 (describing the law of nations as part of the common law).

This traditional immunity had no constitutional source and needed none. In 1781, a Philadelphia plaintiff sought to compel Virginia's appearance by attaching its goods. *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 n. (Pa. C.P. Phila. County 1781). At the time, the newly enacted Articles of Confederation had already imposed full faith and credit obligations on the States, deprived them of the rights to make treaties or to engage in war, and created a tribunal to hear "all disputes and differences *** between two or more States." Articles of Confederation of 1781 arts. IV, VI, IX. Yet none of this transformed the States' basic relationship as mutual sovereigns, nor did the Articles' structure or values determine the decision in *Nathan*.

Instead, both parties in *Nathan* understood the case to turn directly on the law of nations. Pennsylvania's

attorney general argued that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void," meaning that the court "had no jurisdiction over Virginia." *Nathan*, 1 U.S. at 78 n. (argument of counsel); accord Letter from Joseph Reed to Virginia Delegates (July 10, 1781), in 3 The Papers of James Madison: Congressional Series 187, 187 n.2 (William T. Hutchinson et al. eds., 1963). The only significance of the Articles was that they did nothing—leaving each State's sovereignty intact, "with every power, jurisdiction, and right, not expressly given up." *Nathan*, 1 U.S. at 78 n. (argument of counsel) (paraphrasing Articles of Confederation art. II). The plaintiff's counsel in *Nathan* did likewise, arguing that the law of nations afforded only a limited immunity. *Id.* at 79 n. The court agreed with the attorney general and upheld the broader immunity, as did another court considering a similar case the same year. *Id.* at 80 n.; *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9697).

B. Ratification did not alter the legal status of sovereign immunity.

Like the Articles, the Constitution largely left the States' sovereign immunity alone. The Board portrays Ratification as an agreement to constitutionalize the rules of sovereign immunity. Pet. Br. 35. But that is wrong as a matter of both text and history.

As to text, the Board points to such features as the Full Faith and Credit Clause, the limits on state treaty and war powers, and the creation of independent federal tribunals to argue that Ratification transformed the nature of sovereign immunity. Pet. Br. 31–32. But

these features were all present in the Articles, and so they marked no transformation.

As to history, the Board points to the near-universal conviction at the Founding that States were not amenable to suit in sister-state courts. Pet. Br. 21–28. But the Founders spoke of these immunities as common-law rules, not constitutional ones. The Constitution's supporters assumed that "background principles of general law would continue to protect states from being haled into court without their consent"; the only relevant question was whether Article III would *override* these principles with new constitutional rules. Nelson, *supra*, at 1568. For some suits against States, such as those filed by a sister State or the Federal Government, Article III was indeed understood to waive jurisdictional immunities. See, *e.g.*, *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838); cf. *United States* v. *Mississippi*, 380 U.S. 128, 140–41 (1965). At the same time, prominent Founders denied that the Constitution reflected similar consent to individual suits, assuring skeptics that this common-law immunity would survive Ratification. They did not argue that the Constitution itself ratified this immunity, nor did they treat sovereign immunity generally as a new rule of constitutional law.

Hamilton, for example, rejected the argument that the state-diversity clauses could be interpreted as abrogating sovereign immunity. He argued that it was "inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*," and that the power to compel sovereigns to appear could not be "ascribe[d] to the federal courts, by

mere implication." The Federalist No. 81, *supra*, at 548–49. Because this immunity was not surrendered "in the plan of the convention," he argued, "it will remain with the states." *Id.* at 549. This argument was entirely negative: it articulated the law by highlighting what the Constitution had *not* done to change it.

Madison likewise focused on what the Constitution would leave alone. He drew an analogy between sovereign immunity and other common-law doctrines, such as coverture and alienage, that had not been abrogated by the heads of federal jurisdiction. As he put it, "[a] *femme covert* may be a citizen of another state, but cannot be a party in this court"; and an "alien enemy," though diverse from "a citizen of this state, *** cannot bring suit at all." 3 The Debates in the Several State Conventions 533 (Jonathan Elliott ed., Phila., J.B. Lippincott Co. 2d ed. 1891) (Elliott's Debates). Madison's point was not that Article III constitutionalized the law of coverture and alienage, transforming them into permanent limits on federal jurisdiction. Rather, the Constitution simply took these common-law capacity rules as it found them, as separate doctrines (like preclusion or estoppel) under which an otherwise well-pleaded suit might fail. Because sovereign immunity was another such doctrine, the state-diversity provision could in practice "have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." *Id.*; see also Baude, *supra*, at 9–10; Sachs, *Backdrops*, *supra*, at 1870–71; accord 3 Elliott's Debates, *supra*, at 555–57 (John Marshall).

James Iredell's famous dissent in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), adopted the same reasoning. Though he concentrated on statutory questions, Iredell also contended that the States' preexisting immunities had been left unaffected: "[E]very word in the Constitution may have its full effect without involving this consequence, and *** nothing but express words, or an insurmountable implication *** would authorise the deduction of so high a power." *Id.* at 450. Iredell understood the "Conventional Law of Nations," *id.* at 449, to preserve the States' sovereign rights "[i]n every instance where authority has *not* been so surrendered," James Iredell's Observations on State Suability (Feb. 11–14, 1792), *in* 5 The Documentary History of the Supreme Court of the United States, 1789–1800, at 76, 82 (Maeva Marcus ed., 1994) (DHSC). And when the Eleventh Amendment constitutionalized some of the States' immunities, it eliminated the only portion of Article III that could plausibly have justified a contrary construction—instructing that "[t]he Judicial power of the United States shall not be construed to extend" to private state-diversity suits. U.S. Const. amend. XI.

The Board repeatedly confuses the Founders' choice *not to abrogate* sovereign immunity with a decision *to entrench* it, transforming the traditional common-law immunities into new rules of constitutional law. See Pet. Br. 3, 20, 23, 36. But no clause actually works such a transformation, and none was needed. The Constitution simply leaves those rules alone.

C. The Constitution indirectly preserves the States' common-law immunities by declining to authorize their abrogation.

The only provision of the Constitution that does address sovereign immunity is the Eleventh Amendment. Since that Amendment's adoption, the Court has applied immunity doctrines in many contexts that cannot be explained by reference to its terms. The Amendment applies only to suits where diversity is present, and not to federal-question suits by a State's own citizens—as in *Hans*, 134 U.S. 1, or *Seminole Tribe*, 517 U.S. 44. And it applies only to federal courts, and not to state courts—as in *Alden*, 527 U.S. 706, or here.

The Court's cases are correct, but the Board is wrong about why. The Board celebrates these cases as recognizing immunity "beyond the constitutional text," Pet. Br. 19, and it criticizes "undue focus on the constitutional text" in favor of broader claims about "the federal structure of the Union." Pet. Br. 18, 35. Yet the Founders and the Court were more faithful to the text than the Board credits. Though the common-law rules of immunity were not directly entrenched, they are indirectly protected by features of the written Constitution. That text creates a government of limited powers, safeguarding state sovereign immunity from Congress simply by granting no power to upset it. As a result, common-law immunity can explain modern doctrine without any makeshift structural supports.

Sometimes the Constitution's text forbids certain changes to a nonconstitutional rule. The classic example is the law of sovereign borders. The Constitution says nothing about where the States begin

and end, how they are affected by accretion and avulsion, and so on. It simply declines to "Prejudice" their territorial claims, U.S. Const. art. IV, §3, cl. 2, forbids Congress from redrawing state lines, *id.* cl. 1, and establishes federal tribunals to resolve territorial disputes, *id.* art. III, §2, cl. 1—which they do by reference to "ordinary background law," *New Jersey* v. *New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); see Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1255–69 (2017). "Backdrop" rules like these are not part of the Constitution, but they resemble constitutional rules in effect, as bona fide constitutional rules serve to keep them in force.

The traditional rules of sovereign immunity were nonconstitutional rules of this kind, which were sometimes kept in force by rules of constitutional law. For example, Justice Iredell in *Chisholm* understood Georgia's common-law immunity to survive Article III's specific state-diversity provision. That common-law immunity is not a distinct requirement of Article III, but a common-law rule that Article III declines to abrogate and allows to operate of its own force. The immunity likewise survives Article III's other, more generic heads of jurisdiction—thereby explaining the holding in *Hans*, which refused to read the grant of federal-question jurisdiction as authorizing "suits and actions unknown to the law," 134 U.S. at 15. These suits and actions remain unauthorized, unless the States' common-law immunity can be abrogated by other means. See Baude, *supra*, at 9–10.

For similar reasons, a generic Article I power to "regulate Commerce *** with the Indian Tribes," U.S. Const. art. I, §8, cl. 3, need not confer a power to

abrogate a State's immunity—thereby explaining the holding in *Seminole Tribe*, 517 U.S. at 70 & n.13. Although Congress may pass laws "necessary and proper" to carrying other powers into execution, U.S. Const. art. I, §8, cl. 18, abrogating the States' sovereign rights may well be a "great substantive and independent power, which cannot be implied as incidental to other powers," and which must be enumerated explicitly if it is to be conferred at all. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819); see Baude, *supra*, at 15; Nelson, *supra*, at 1640. If Congress has no Article I abrogation power, then the preexisting common-law rules of immunity remain in force by default.

And if Congress generally lacks power to abrogate a State's immunity in federal court, then *a fortiori* it lacks power to do so in *state* court, where its Article I powers are no greater—thereby explaining the holding in *Alden*, 527 U.S. at 741. The substance of the immunity is inherited "from the common-law tradition," but the common-law rules are effectively "protected by the Constitution," and Congress's limited power to abrogate them "exists today by constitutional design." *Id.* at 733–34; see Baude, *supra*, at 16–17.

An enumerated power to abrogate might be available on some topics but not others. Perhaps abrogation is "appropriate" for enforcing the Fourteenth Amendment, though not necessary and proper to regulating Indian commerce. Compare *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe*, 517 U.S. at 59, 70. In any case, this is "ultimately a question of enumerated powers," Baude, *supra*, at 21—which turns on the details of each

particular power, and not on abstract visions of "federal structure," Pet. Br. 35.

The Board's structural argument in this case, however, reverses the ordinary presumptions of constitutional interpretation. The Board suggests that the States necessarily "relinquished jurisdiction" whenever "adjudication in state court would be inconsistent with the federal structure." Pet. Br. 35. But under our Constitution, "[t]he powers delegated *** to the Federal Government, are few and defined," while "[t]hose which are to remain in the State Governments are numerous and indefinite." The Federalist No. 45 (James Madison), *supra*, at 313. It is dangerous to read Founding-era references to structural limits on *federal* judicial power as imposing similar limits on the power of the state judiciaries.

The enumerated-powers theory that supports *Seminole Tribe* and *Alden* does not extend to the States, which are "bound by neither Article I, nor Article III, nor the Eleventh Amendment." Baude, *supra*, at 25. Rather, the States retain every power with which they entered the Union—including any power to abrogate another State's immunity within their own courts—that has not been "delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. That is why *Hall* pointed to "the Tenth Amendment's reminder," requiring "caution *** before concluding that unstated limitations on state power were intended by the Framers." 440 U.S. at 425. And that is also why *Alden* quoted *Hall* and emphasized that the Constitution "treats the powers of the States differently from the powers of the Federal Government." 527 U.S. at 739.

Those conclusions should not be disturbed, because they are correct.

II. The Constitution may enforce sister-state immunity indirectly, by refusing to guarantee the recognition of judgments.

At first glance, the rule in *Hall* might seem absurd: surely the Constitution does not leave state courts free to hear any lawsuit they wish against other States. That intuition is understandable, but misdirected. While *Hall* was correct to reject an unenumerated right of sovereign immunity, it was likely quite wrong to reduce sister-state immunity to a "matter of comity," 440 U.S. at 425, or to deny that "the Constitution places *any* limit" on sister-state jurisdiction, *id.* at 421 (emphasis added). Our federal system may well limit a State's power to abrogate sister-state immunity, through the lack of binding effect such judgments would have in other courts.

Because sovereign immunity is a rule of common law and the law of nations, a State can abrogate it within its own courts, just as it can abrogate the common-law rules of coverture, burglary, or respondeat superior. See *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 143 (1812); see also Baude, *supra*, at 27–28. But the State's power may well end there. As nearly a century of history suggests, the original Constitution did not force state or federal courts to respect the judgment of a court which lacked power over the defendant under traditional jurisdictional principles. Sister-state immunity was just such a principle. Thus, a State which tries to abrogate that immunity may find its judgments without effect in other American courts.

If so, the Constitution allows States to resist improper sister-state jurisdiction through the same mechanisms it long used to address improper state-court jurisdiction generally. The Founders did not necessarily leave sister-state immunity out of the constitutional text because it was "not a matter of concern," *Hall*, 440 U.S. at 418–19, or because "it was too obvious to deserve mention," *id.* at 431 (Blackmun, J., dissenting). Instead, the topic may simply have needed no attention, because adequate off-the-shelf protections were already in place.

A. The law of nations allowed sovereigns to abrogate others' immunities only within their own courts.

Among nations, sovereign immunity traditionally depended on the forum's consent, in that the local sovereign could always instruct local courts not to respect it. As Chief Justice Marshall explained in *The Schooner Exchange*, "all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory." 11 U.S. at 143. In the eyes of the law of nations, a sovereign always had the power, if not always the right, to "exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world." *Id.* at 137. Similarly, as Justice Story noted in *The Santissima Trinidad*, a sovereign could always "withdraw[] its consent to allowing foreign warships to enter, "without just offence"; but it still could not rightfully compel "a foreign sovereign *** to appear in our Courts, or [to] be made liable to their judgment, so long as he remains in his own dominions." 20 U.S. (7 Wheat.) 283, 353 (1822).

By the same token, sovereigns had no power on their own to make their judgments against other sovereigns effective in other courts. In the international context, such judgments might be recognized only as a matter of comity. See generally *Hilton* v. *Guyot*, 159 U.S. 113 (1895). And one reason for refusing recognition might be that the rendering court had violated international law: "[I]f it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts." *Rose*, 8 U.S. at 276–77; accord *Bradstreet* v. *Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (Story, Circuit Justice, CCD Mass. 1839) (No. 1793); Joseph Story, Commentaries on the Conflict of Laws §586, at 492 (Boston, Hilliard, Gray & Co. 1834).

That may be why, in *Nathan*, Pennsylvania's attorney general described the offending process as "void." 1 U.S. at 78 n. In the eyes of the law of nations, "Pennsylvania lacked the power, by its own unilateral legislative or constitutional act, to abrogate Virginia's immunity." Pfander, *supra*, at 582 n.102. Even today, "foreign sovereign immunity is a matter of grace and comity on the part of the United States," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); but if the United States departs from accepted international practice, it cannot guarantee that its judgments will continue to be recognized abroad.

B. States may owe no faith and credit to judgments that violate sister-state immunity.

Ordinarily, a State must recognize the judgment of another State's court under the Full Faith and Credit Clause and its implementing statute. U.S. Const. art. IV, §1; 28 U.S.C. §1738 (2012). *Hall* therefore assumed that a single State's abrogation of immunity would automatically be effective nationwide. See 440 U.S. at 421.[2] This assumption may well have been incorrect, and it could be revisited in an appropriate case.

As *Hall* noted, effect is only given to judgments issued with "jurisdiction over the parties." *Id.* Yet the core of the Founding-era immunity doctrine was that States were *not* amenable to jurisdiction without their consent. For nearly a century after the Founding, courts enforced traditional limits on jurisdiction by refusing recognition to improper judgments, even if they were considered lawful where they were rendered. A State that abrogated sister-state immunity would have found the resulting judgments unrecognized in other courts.

Beginning under the Articles of Confederation—which also contained a full faith and credit clause—courts expected "competent jurisdiction" under "common law rules" before giving a judgment "due faith and credit" under "[t]he act of confederation *** and the law of nations." *Jenkins* v. *Putnam*, 1 S.C.L. (1 Bay)

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[2] This full-faith-and-credit issue is distinct from that addressed in *Franchise Tax Board* v. *Hyatt*, 136 S. Ct. 1277 (2016), namely whether a State violates the Clause when prescribing the law for its own courts.

8, 10 (1784) (*per curiam*); see Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1221–26 (2009). This practice continued under the Constitution. See, *e.g.*, *M'Elmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326–27 (1839); *Flower* v. *Parker*, 9 F. Cas. 323, 324–25 (Story, Circuit Justice, CCD Mass. 1823) (No. 4891); *Bissell* v. *Briggs*, 9 Mass. (9 Tyng) 462, 467 (1813) (opinion of Parsons, C.J.). Courts generally agreed that "a state judgment could be challenged in other courts for violating general-law rules of personal jurisdiction," for the Clause and its implementing statute only applied "to valid judgments that respected the prevailing rules." Sachs, Pennoyer *Was Right*, *supra*, at 1276; see *id.* at 1269–87.

Even if a judgment had been properly rendered under the forum State's law, it would have no effect in other courts unless it complied with the traditional limits. See, *e.g.*, *Picquet* v. *Swan*, 19 F. Cas. 609, 612 (Story, Circuit Justice, CCD Mass. 1828) (No. 11,134); *Bartlet* v. *Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.). In *D'Arcy* v. *Ketchum*, this Court squarely held that the Constitution and Congress had left intact the "the international law as it existed among the States in 1790"—concluding that a state judgment, though authorized by local statute, would have "force and effect beyond the local jurisdiction" only if it complied with the "well-established rules of international law, regulating governments foreign to each other." 52 U.S. (11 How.) 165, 174, 176 (1851); see also *Hall* v. *Lanning*, 91 U.S. 160, 168–69 (1875).

Though the scope of state-court jurisdiction is surely fundamental to our federal structure, the courts understood these cases to turn on questions of common

law and the law of nations, and not of constitutional law. For most litigants, that changed upon the adoption of the Fourteenth Amendment, as a state judgment asserting jurisdiction could be invalidated on due process grounds. *Pennoyer* v. *Neff*, 95 U.S. 714, 732–33 (1878); Sachs, Pennoyer *Was Right*, *supra*, at 1287–1313. But the States are not "persons" for due process purposes, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966), and they cannot make use of a due process defense. So the traditional limits on jurisdiction over States might well be enforced today as they had been before, by denying recognition on common-law grounds.[3]

Even today, the courts will still refuse recognition to a determination that a State court "had no power to make." See *Thomas* v. *Wash. Gas Light Co.*, 448 U.S. 261, 282–83 (1980) (plurality opinion); accord *V.L.* v. *E.L.*, 136 S. Ct. 1017, 1020 (2016); *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222, 240–41 (1998). While the

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[3] Though this brief uses the terms interchangeably, the common law applicable to State sovereign immunity may have grown apart from the law-of-nations doctrines applicable to foreign sovereigns. Modern international practice arguably reflects a "restrictive" theory of immunity, which might permit jurisdiction over the in-state torts alleged by Hyatt, while the American practice regarding the immunity of the States and of the United States does not. Compare *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999), with Restatement (Third) of the Foreign Relations Law of the United States §451 & cmt. *a* (Am. Law. Inst. 1987); *id.* §454(1) & cmts. *a*, *d*. But the Court may ignore this issue for now. Hyatt has invoked international law to suggest that sister-state immunity is a matter of Nevada's comity and consent, not to argue that the Board lacks immunity for the type of actions alleged. See BIO 14; see also this Court's Rule 15.2.

Constitution does not stop a State from abrogating immunity doctrines internally, it also might not help the State secure recognition for the resulting judgments.

The Founders might never have specifically contemplated how recognition doctrines would protect sister-state immunity: few plaintiffs were bold enough to bring such suits, and fewer courts were willing to let them. But the Founding-era law of recognition offered a wholly adequate means of invalidating such judgments if they ever arose, and it may do the same today. In an appropriate case, the Court could address that law and revisit the relevant portions of *Hall*.

III. This case is an unsuitable vehicle for revisiting *Nevada* v. *Hall*.

This is not an appropriate case for revisiting *Hall*. A State wishing to assert the defenses described above might have a number of strategic options to avoid the specter of dueling judgments, asset seizures, and races to the courthouse described in *Hall*, 440 U.S. at 429–30 (Blackmun, J., dissenting); *id.* at 443 (Rehnquist, J., dissenting). Unfortunately, the Board's strategy—appearing in state court, litigating the case to judgment, and seeking federal-question review—may have placed it outside the protections of the common-law immunity. This case is therefore a poor vehicle for revisiting those protections.

What is more, the Board's strategy has brought this Court's subject-matter jurisdiction into question. The Court's adjudication of this case sits in violation of the plain text of the Eleventh Amendment, which limits the federal courts' judicial power, and which therefore

(unlike the immunity preserved in *Hans* and *Alden*) cannot be discarded by waiver or consent.

Because the issues cannot be resolved cleanly in this case, and especially because the Court's own subject-matter jurisdiction is in doubt, the writ should be dismissed as improvidently granted.

A. States may have effective tools for resisting sister-state judgments, but the Board cannot use them.

If a State attempts to abrogate sister-state immunity within its own courts, the defendant States have a number of tools for resisting adverse judgments. The most obvious strategy is simply to default, as Georgia did in *Chisholm*, see 2 U.S. at 419, and to resist enforcement later on. Once Hyatt filed his complaint, the Board could have ignored the summons, waited for Hyatt to try to collect elsewhere, and challenged the judgment then. See *Hall*, 440 U.S. at 429–30 (Blackmun, J., dissenting); see also Note, Nevada v. Hall: *The Death Knell of Interstate Sovereign Immunity*, 9 Cap. U. L. Rev. 113, 125 & n.78 (1979).

To avoid seizures of its assets in other States, the Board could also have filed its own action against Hyatt in federal court (including in this Court, see U.S. Const. art. III, §2, cl. 2; 28 U.S.C. §1251(b)(3) (2012)). A federal forum is not necessarily bound by Nevada's efforts to abrogate sister-state immunity in its own courts, just as *D'Arcy* was not bound by a state statute asserting an exorbitant personal jurisdiction. When the Constitution allows for federal jurisdiction without prescribing a rule of decision, it necessarily "gives power to decide according to the appropriate law of the

case," which in interstate cases will often include the "principles of the law of nations." *Rhode Island*, 37 U.S. at 737, 748. A federal forum might thus award declaratory relief to shield the interests of the defendant State.

Alternatively, California could have filed an original action against Nevada in this Court, see §1251(a), seeking a declaration of its entitlement to sister-state immunity. Again, this Court is not necessarily bound by a State's efforts to abrogate immunity in its own courts. (Indeed, Nevada might well consent to such an action, as it has joined in asking this Court to overturn *Hall*. See Br. for Indiana et al. on Pet. for Cert. 1, 11.)[4]

The Board did none of these things. It entered an appearance in the Nevada court, argued the merits, litigated the case to judgment, and eventually sought this Court's review on federal-question grounds. See Pet. for Cert. 2 (invoking 28 U.S.C. §1257 (2012)); Pet. Br. 4 (same). That was the wrong approach. Because the Nevada judgment infringed no *federal* right, this Court has no proper means by which to disturb that judgment. And because the common-law immunity concerns the State's amenability to compulsory process, the Board's appearance may have waived its ability to contest the judgment.

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[4] To the extent that an action for a purely declaratory judgment might be thought to fall afoul of the Anti-Injunction Act, 28 U.S.C. §2283 (2012), that issue can be addressed by Congress, without this Court needing to distort the constitutional law of immunity.

1. The Board has no federal right that supports disturbing the judgment under review.

Had this case arisen under another head of jurisdiction, the Court could review the Nevada judgment in full. But the Board invokes this Court's jurisdiction under §1257, apparently because a "title, right, privilege, or immunity is specially set up or claimed under the Constitution," §1257(a). This case does not involve any title or right granted by the Constitution or any other form of federal law. And the Court has long recognized that a judgment resting on "the law of nations" and "principles of general law alone" cannot support the exercise of federal-question jurisdiction. *N.Y. Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1876); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1875) ("general principles of equity jurisprudence").

Modern courts sometimes view interstate disputes like these as involving "federal common law," for which federal-question jurisdiction is sometimes available, see *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100, 103 (1972); accord Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 261. But the Founders did not. "Nothing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century." Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1274 (1985). And the relevant statutory provision addressing appellate review of state judgments refers to rights and titles granted by "the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

§1257(a). Whatever "federal common law" may be, it is not a Constitution, treaty or statute. The Court therefore lacks any basis for reversing in this case.

2. The Board's voluntary appearance has jeopardized its ability to challenge the judgment.

Even if this Court could reexamine the Nevada judgment under a different head of jurisdiction, the Board's appearance in Nevada court may have vitiated the issue.

While Eleventh Amendment immunity addresses "[t]he Judicial power of the United States," U.S. Const. amend. XI, and is traditionally understood as limiting the courts' subject-matter jurisdiction, the traditional common-law and law-of-nations immunity addressed the States' amenability to compulsory process—a topic in what we would now call personal jurisdiction, and something that can be waived. See Nelson, *supra*, at 1565. Historically, a court's lack of power to compel attendance was understood to be wholly cured by the party's voluntary appearance. See *Mayhew* v. *Thatcher*, 19 U.S. (6 Wheat.) 129, 130 (1821); *Pollard* v. *Dwight*, 8 U.S. (4 Cranch) 421, 428–29 (1808). The same doctrines were applied to questions of immunity: Iredell's *Chisholm* dissent noted that the issue had not been squarely presented in an earlier case against Maryland, "because the Attorney-General of the State voluntarily appeared," 2 U.S. at 429.

Today we still recognize that "[b]y submitting to the jurisdiction of the court," even "for the limited purpose of challenging jurisdiction," a party "agrees to abide by that court's determination on the issue of jurisdiction,"

which "will be res judicata on that issue in future proceedings." *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). Here the courts of Nevada have found jurisdiction to be present, and there is no federal-question basis on which to disturb their judgment. And under modern doctrine, once an issue of jurisdiction has been fully and fairly litigated and finally decided, the court's ruling will be conclusive on the parties. *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963).[5]

As a result, the Board may well be bound to satisfy this particular judgment, even if it could successfully claim immunity in future suits.

B. The Eleventh Amendment may deprive this Court of jurisdiction.

More urgently, and somewhat ironically, this Court's own Article III jurisdiction is itself in serious question. This lawsuit was commenced in 1998 by Hyatt, then a citizen of Nevada, see J.A. in No. 02–42, p. 45, against an entity that both parties treat as the State of California.[6] As such, it is a "suit in law or equity" to which "[t]he Judicial power of the United States shall

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[5] *Durfee* suggested that sovereign immunity might present an exception to this rule, but it noted that "in neither of [the cited] cases had the jurisdictional issues actually been litigated in the first forum," 375 U.S. at 114 & n.12.

[6] For Eleventh Amendment purposes, the Court may assume that the Board stands in for the State, as the petitioner has the burden of establishing the Court's jurisdiction. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983). The Board has not claimed to be distinct from the State, and indeed its position is founded on sharing California's sovereign immunity.

not be construed to extend," U.S. Const. amend. XI—and which the federal courts, including this Court, cannot hear.

To be sure, it was the Board that brought this case to the Court on petition for certiorari. But the case was "commenced" by Hyatt, which is what matters for Eleventh Amendment purposes. As Chief Justice Marshall explained at length in *Cohens* v. *Virginia*, the party who "commenced or prosecuted" a suit is the one who initiated the proceedings, not the one who brings the case to this Court: "Whatever may be the stages of its progress, the actor is still the same." 19 U.S. (6 Wheat.) 264, 408 (1821). Otherwise, no diverse criminal defendant could ever seek certiorari review of his state conviction, for that would be prosecuting a suit against a State. See *id.* at 410–12. So if Hyatt's suit was beyond "[t]he Judicial power of the United States" when it was commenced in state court, it is also beyond this Court's appellate jurisdiction today.

Under current precedent, a State may voluntarily set aside the Amendment's limitations on "[t]he Judicial power," see *Lapides* v. *Board of Regents*, 535 U.S. 613, 616 (2002); *id.* at 619 (citing *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883); *Gunter* v. *Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)). And these limitations do not even apply to "appellate review of state-court judgments," on the theory that such review is "inherent in the constitutional plan," *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 28, 30 (1990) (citations and internal quotation marks omitted). But the cases do not address the text or history of the Amendment, which was written to

confine the power of the federal courts and which intentionally eliminated the parties' discretion.

Though the parties have not asked the Court to reconsider these doctrines, the question of jurisdiction is one this Court "is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it"—indeed, "even though the parties are prepared to concede it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (citations and internal quotation marks omitted). The Court therefore cannot proceed without deciding on its own what to make of these dubious precedents.

1. The Eleventh Amendment was enacted as a nonwaivable restriction on the judicial power of the United States.

After *Chisholm* held that States could be called to answer in federal court, some reform proposals were framed in terms of the traditional common-law immunity from suit, protecting the States from personal jurisdiction and compulsory process in a federal trial court. See, *e.g.*, *Proceedings of the U.S. House of Representatives* (Feb. 19, 1793), Gazette of the United States (Phila.), Feb. 20, 1793, *in* 5 DHSC, *supra*, at 605, 605–06. But the language that eventually became the Eleventh Amendment focused instead on subject-matter jurisdiction and the scope of "The Judicial Power" as a whole, see Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, *supra*, at 607, 607–08. There is good reason to think that this shift in the Amendment's drafting was meaningful, and

that it closed the federal courts without exceptions for waiver or appeal.

By declaring how the original Constitution was to be "construed," the Amendment "annulled all jurisdiction of such cases then pending," even if "the court had acted on [the case] for years." *Dudley's Case*, 7 F. Cas. 1150, 1151 (Baldwin, Circuit Justice, CCED Pa. 1842) (No. 4114); accord Nelson, *supra*, at 1604 & n.222. And by restricting the federal judicial power, the Amendment eliminated any argument that a State's appearance reflected consent—for "lawyers of the 1790s certainly knew of the argument that subject matter jurisdiction (unlike personal jurisdiction) could not be conferred by consent." Nelson, *supra*, at 1605; accord *id.* at 1605 n.223 (citing sources). As the Court in *Rhode Island* noted, objections to "the manner of bringing the defendant into court" are "waived by submission to the process," but "appearance does not cure the defect of judicial power." 37 U.S. at 719.

Today, it might seem odd to close the courthouse door to a State that actively desires to open it (and only to out-of-state plaintiffs). But a blanket prohibition made good sense at the time. There were a number of state-diversity suits already pending in federal courts, and in some of them the States had already entered appearances. "If the Amendment had simply protected states against being haled into court, then it might have had no impact on pending cases in which (according to [*Chisholm*]) personal jurisdiction had already attached." Nelson, *supra*, at 1604. (And restricting the Amendment to trial courts might have done little good, if this Court could review both "Law and Fact" in equity cases appealed from state courts.

U.S. Const. art. III, §2, cl. 2; cf. *id.* amend. VII.) The Amendment was designed to do more, as the Supreme Court confirmed immediately after it was declared ratified—holding that "there could not be *any jurisdiction*, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state." *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798) (emphasis added); accord *id.* at 380 (argument of counsel) (conceding its application to federal-question appeals).

"When given its most natural reading, the Eleventh Amendment creates a second type of sovereign immunity, which sounds in subject matter jurisdiction and which therefore cannot be waived"—while the traditional common-law immunity, which may apply in "situations that the Eleventh Amendment does not cover," can be waived by submitting to the trial court's jurisdiction. Nelson, *supra*, at 1566. Modern doctrine has sometimes "failed to keep the two tracks separate," *id.*—creating a doctrine with a "hybrid nature," *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring), in which the Amendment's precise terms are treated as a stand-in for "the original constitutional design" writ large. *Alden*, 527 U.S. at 722. But distinguishing the constitutional and common-law immunities lets us read the Eleventh Amendment's text for what it says: that it is a precise limitation on the federal judicial power, and that "suits covered by the Amendment simply cannot proceed in federal court." Nelson, *supra*, at 1615.

2. Cases permitting evasion of the Amendment deserve little deference.

Under modern doctrine, a State is "free to waive its Eleventh Amendment immunity," *Lapides*, 535 U.S. at 618, and such immunity "does not circumscribe *** appellate review," *McKesson*, 496 U.S. at 28. But the cases which established these propositions do not wrestle with the text or history, and they can make little claim to the protections of stare decisis.

To our knowledge, the earliest case to describe Eleventh Amendment immunity as waivable in federal court was *Clark* v. *Barnard*, which concerned a fund held by the city of Boston. 108 U.S. at 442.[7] The Court held that it could disregard Eleventh Amendment issues relating to the treasurer of Rhode Island, named as an additional party, because of the "voluntary appearance" of that State "in intervening as a claimant of the fund in court." *Id.* at 447. According to the Court, "[t]he immunity from suit belonging to a State *** is a personal privilege which it may waive at pleasure"—such as by intervening "in a suit, otherwise well brought," which would "be a voluntary submission to [the court's] jurisdiction." *Id.* Because Rhode Island had "appeared in the cause and presented and prosecuted a claim to the fund in controversy," it "became an actor as well as defendant," making the proceeding into "one in the nature of an interpleader." *Id.* at 448.

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[7] *Curran* v. *Arkansas*, 56 U.S. (15 How.) 304, 309 (1853), was prosecuted by an individual in state court and then appealed to this Court; but it was not an Eleventh Amendment case, as the plaintiff was a citizen of Arkansas. Tr. of Record in *Curran*, 56 U.S. 304, at 3.

Clark cited no authority for its assertion that Eleventh Amendment immunity was waivable. And it seems to have conflated the State's ability to prosecute its own claim before a federal court—which the Amendment leaves untouched—with an ability to submit to a federal lawsuit as a defendant. Cf. 3 Joseph Story, Commentaries on the Constitution of the United States §1683, at 561 (Boston, Hilliard & Gray 1833) (distinguishing the two). Nonetheless, other cases then cited *Clark*, see, *e.g.*, *Gunter*, 200 U.S. at 284, and the Court has not looked back since. See, *e.g.*, *Lapides*, 535 U.S. at 619 (citing *Clark*); *Schacht*, 524 U.S. at 389 (same).

Likewise, though *McKesson* cited "several recent cases" for the Eleventh Amendment's nonapplicability to appeals, 496 U.S. at 28 n.9, these "drive-by jurisdictional rulings" carry little force, *Steel Co.*, 523 U.S. at 91, as they failed to join issue with the Constitution's text. The Amendment unambiguously limits the judicial power in suits that continue to be "prosecuted" on appeal, as courts and parties recognized at the time. See *Cohens*, 19 U.S. at 408–09; *Hollingsworth*, 3 U.S. at 380 (argument of counsel). And this Court's "appellate Jurisdiction" only extends to "other Cases" within the "judicial Power of the United States," U.S. Const. art. III, §2, cl. 1–2; there is no "constitutional plan" for appellate review over and above the particular grants and limitations of judicial power. Compare *McKesson*, 496 U.S. at 30, with *Seminole Tribe*, 517 U.S. at 87 (Souter, J., dissenting) (describing *McKesson*'s reasoning as "specious"). If Hyatt's suit was beyond the judicial power when filed in state court, it is beyond the Court's jurisdiction now.

As the Board notes regarding *Hall*, in the field of state sovereign immunity the stare decisis factors are "at their lowest ebb"; these cases are constitutional, not statutory, and they do not address questions of primary conduct. Pet. Br. 13. If a precedent may be measured by "the quality of its reasoning," *Janus* v. *Am. Fed'n of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2479 (2018), then *Clark* and *McKesson* deserve little deference. What's more, these lines of decisions are inconsistent with the enormous bodies of precedent on the nonwaivability of subject-matter jurisdiction and the limited grounds for appellate review.

The Court's jurisdiction in this case is therefore in serious doubt. Because these issues are jurisdictional, they cannot be ignored. But they also deserve more extensive consideration than can be provided in an *amicus* brief. If the Court does not wish to order supplemental briefing on jurisdiction, it may wish to postpone its reconsideration of *Hall* for a case that presents the issues more cleanly—for example, one in which the State is the plaintiff, resisting enforcement of a default judgment under another head of jurisdiction.

For now, the Court could dismiss the writ as improvidently granted, perhaps with an explanatory opinion. See, *e.g.*, *Roper* v. *Weaver*, 550 U.S. 598 (2007) (*per curiam*). Alternatively, it should reach the jurisdictional issue and dismiss the writ for lack of jurisdiction. If satisfied of its jurisdiction, however, the Court should affirm the Nevada judgment, for lack of a federal-question basis on which to disturb it.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the writ should be dismissed for want of jurisdiction, or the judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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Constitution of the United States

Art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. IV, § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 28, United States Code

28 U.S.C. § 1257:

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF INDIANA AND 43 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioner. The *amici* States have a strong interest in protecting their sovereign immunity by overturning *Nevada v. Hall*, 440 U.S. 410 (1979). *Hall* is—and always has been—irreconcilable with the Court's larger body of sovereign immunity decisions, and the *amici* States urge this Court to overturn it.

SUMMARY OF THE ARGUMENT

Forty years ago in *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that States could be subject to suit in the courts of their sister States. Petitioners along with 44 *amici* States now urge this Court to overrule *Hall*.

Nevada v. Hall was wrongly decided because state sovereign immunity is not limited to the text of the Eleventh Amendment. At common law, sovereign immunity, even in the courts of another sovereign, was assumed. The States did not relinquish that immunity when they ratified the Constitution. Instead, the

framers understood the Constitution to preserve the traditional sovereign immunity of the States. The Eleventh Amendment was enacted not to outline the boundaries of state sovereign immunity, but to restore its common law understanding. *Hall*'s holding that state sovereign immunity is not protected in the courts of other States contravenes both this history and the Court's precedents.

Moreover, the numerous suits brought against States in other States' courts in the decades since *Hall* are an insult to state sovereignty. This insult is particularly harmful in the tax context, which goes to the core of state police power. *Hall* undermines the administrative review processes that States have set up to protect their sovereignty with respect to this important state function.

Finally, *stare decisis* should give way to overruling *Hall*. Not only was *Hall* wrongly decided, but no reliance interests weigh against reconsideration, as private plaintiffs do not structure their decisions or interests around the vulnerability of States to lawsuits in the courts of other States.

ARGUMENT

I. *Nevada v. Hall* Was Wrongly Decided

Nearly forty years ago, in *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979), the Court held that the Constitution does not bar lawsuits against a State in the courts of another State. In doing so, it relied on the proposition that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh

Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of" state courts to exercise jurisdiction over their sister States. *Id.* at 421. But that holding contravenes both the history of the Eleventh Amendment and this Court's subsequent decisions on state sovereign immunity.

A. State sovereign immunity is not limited to the text of the Eleventh Amendment

The Court has long held that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). On the contrary, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* Sovereign immunity predates the Eleventh Amendment and, indeed, the Constitution itself.

1. Common law sovereign immunity originated in feudal England: "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord." *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979). Only the king was completely immune from suit because "there was no higher court in which he could be sued." *Id.* at 415. When the American colonies rebelled against the king, each State became a sovereign in its own right, and thus inherited sovereign immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

At common law and at the time of the founding, a sovereign's immunity from suit, even in the courts of another sovereign, was assumed. William Blackstone explained that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 William Blackstone, Commentaries *235. Similarly, the leading treatise on international law at the time stated that "[o]ne sovereign cannot make himself the judge of the conduct of another." Emmerich de Vattel, The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883).

Such was the prevailing understanding of sovereign immunity under the Articles of Confederation, as demonstrated by the decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). There, a citizen of Pennsylvania sued the Commonwealth of Virginia in Pennsylvania state court over property located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania weighed in, arguing "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Virginia delegates to the Confederation Congress, led by James Madison, similarly argued that the case should be dismissed because it required Virginia to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." James Madison, Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania

(July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T. Hutchinson et al. eds., 1963). The court agreed and held that Virginia was immune from suit. *Nathan*, 1 U.S. (1 Dall.) at 80.

2. The States did not relinquish their sovereign status when they ratified the Constitution. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716. Writing in support of ratification, Alexander Hamilton observed that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*." The Federalist No. 81 (Alexander Hamilton). He argued that "there is no colour to pretend that the State governments would, by the adoption of [the Constitution], be divested" of their immunity and concluded that "to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*

Even those Federalists that believed Article III abrogated state sovereign immunity in federal court did not go so far as to conclude that States could be sued in the courts of other States. Edmund Pendleton argued before the Virginia Convention that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state[] shows the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which as state shall be a party." 3 Elliot's Debates 549.

Such episodes establish that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724. Attorney General Edmund Randolph specifically recognized this principle in his report on the judiciary to the House of Representatives, delivered shortly after ratification: "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 The Documentary History of the Supreme Court of the United States, 1789–1800 130 (Maeva Marcus, ed., 1992). Indeed, as the Court has recognized, "[t]he Constitution would never have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

3. Notwithstanding the prevailing understanding of the framers, the Court held in *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793), that a citizen of one State could invoke federal diversity jurisdiction against another State because such suits were permitted by the literal text of Article III. Justice Iredell dissented, "relying on American history, English history, and the principles of enumerated powers and separate sovereignty." *Alden*, 527 U.S. at 720 (internal citations omitted).

The *Chisolm* decision "'fell upon the country with a profound shock.'" *Id.* (quoting 1 C. Warren, The Supreme Court in United States History 96 (rev. ed. 1926)). Just one day after the decision, the House of Representatives introduced a proposal to amend the

Constitution. *Id.* at 721. After a short recess, each chamber spent only one day discussing the Amendment before passing it. *Id.*

Congress enacted the Eleventh Amendment "not to change but to restore the original constitutional design." *Id.* at 722. Moreover, "it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment." *Id.* at 723. For this reason, the Court has long held that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 729.

The Court's post-Eleventh Amendment decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), confirmed that understanding. In *Hans*, the Court held that sovereign immunity prevents individuals from asserting federal question jurisdiction against States, even though it is not specifically prohibited by the text of the Amendment. *Id.* at 14–15. *Hans* specifically relied on "the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution." *Id.* at 18. And the court has "since acknowledged that the *Chisholm* decision was erroneous." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). That is to say, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.*

B. *Hall* contravenes this Eleventh Amendment history

Nevada v. Hall rests on the flawed premise that state courts may assert jurisdiction over their sister States unless some Constitutional text expressly limits such jurisdiction. 440 U.S. 410, 421 (1979). But that rationale has not survived the Court's more recent observations that sovereign immunity is not limited to the text of the Eleventh Amendment. *See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002); *Alden v. Maine*, 527 U.S. 706, 730 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

The very purpose of Article III was to ensure the foreclosure of interstate conflicts that had plagued the nation by establishing a neutral forum to adjudicate these disputes. Richard H. Pierson, *Constitutional Law—State Sovereign Immunity—Nevada v. Hall, 440 U.S. 410 (1979)*, 56 Wash. L. Rev. 289, 297 (1981). At the time of the Constitutional Convention, every State recognized the sovereign immunity of its sisters and the *in personam* jurisdiction of a state court was accordingly confined to its own citizens and residents. *Id.* at 298. Thus, the appropriate inference is that the inquiry should be whether anything in the Constitution *allows* jurisdiction of state courts over their sister States—not whether anything *forbids* it.

Hall's expectation that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State

to assert jurisdiction over another," *id.* at 419, has proved illusory. *Hall* has "encourage[d] state courts to deny respect to the sovereign immunity of defendant sister states, in circumstances where such denial is at best questionable." Donald Olenick, *Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions*, 80 Colum. L. Rev. 1493, 1498 (1980). Attempts by States to apply *Hall* have led to decisions that are "highly discriminatory" and "inconsistent with the traditional federal-system principles that the states are coequals and that the sovereignty of each state limits the powers of all others." *Id.* at 1499. The Eleventh Amendment was enacted in order to preclude suits in any forum without the consent of the defendant State, Pierson, 56 Wash. L. Rev. at 298, a proposition this Court recognized in *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (stating that federal jurisdiction under Article III is the exclusive remedy available to a citizen of another State).

Nothing in the Constitution allows state courts to exercise jurisdiction over their sister States. The very idea denies States "the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. *Hall*'s holding otherwise was erroneous.

C. Later cases are in tension with *Hall*

Sovereign immunity cases since *Hall* have established what *Hall* rejected—sovereign immunity is derived from the history and structure of the Constitution and is antecedent to the text of both Article III

and the Eleventh Amendment. *Cf. Hall*, 440 U.S. at 426–27.

In *Seminole Tribe of Florida v. Florida*, the Court, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), said that "we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." 517 U.S. 44, 69 (1996) (internal citations omitted). For this reason, the Court held that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 72.

The very next year, in *Idaho v. Coeur d'Alene Tribe of Idaho* the Court again emphasized that the "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment." 521 U.S. 261, 267 (1997). Based on this principle, the Court held that a lawsuit brought by an Indian tribe against the State was barred by the Eleventh Amendment.

Later, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court elaborated: "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715. The Eleventh Amendment was adopted "not to change" the Constitution "but to restore the original constitutional design." *Id.* at 722. For this reason, "the sovereign immunity of the States neither derives

from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713. Ultimately, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.*

Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court held that sovereign immunity barred the Federal Maritime Commission from adjudicating a private complaint against the South Carolina State Ports Authority, even though the text of the Eleventh Amendment applies only to Article III courts. The Court explained that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.* at 753.

Seminole Tribe, *Coeur d'Alene*, *Alden*, and *Federal Maritime Commission* represent a fundamental course correction in the law of sovereign immunity—one that respects constitutional history and structure in a way that several earlier decisions, including not only *Union Gas* but also *Hall*, did not. Yet *Hall* remains as a vestige of the discarded doctrine, one that starkly contradicts other governing sovereign immunity precedents. The Court should overturn it.

II. State Sovereign Immunity Includes Immunity from Suits Brought in other States' Courts

A. Suits against States in other States' courts insult state sovereignty

The Court has held that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). Allowing States to be sued in the courts of other States contravenes that purpose.

First, it would be illogical to interpret the Eleventh Amendment to prohibit all non-consensual lawsuits against States in federal court, *see Hans v. Louisiana*, 134 U.S. 1, 18 (1890), yet allow those "anomalous and unheard-of" suits in state court. *Id.* Indeed, allowing a State to be sued in another State's court would be a *greater* insult to state sovereignty than allowing a similar lawsuit in federal court. Federal courts were designed by the framers of the Constitution to provide a neutral forum. *Nevada v. Hall*, 440 U.S. 410, 437 (1979) (Rehnquist, J., dissenting).

Second, allowing state courts to exercise jurisdiction over sister States "would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750–51 (1999). Lawsuits, especially those for money damages, implicate the "allocation of scarce resources among competing needs and interests"

which "lies at the heart of the political process." *Id.* at 751. If the courts of other States are allowed to make such decisions, they will essentially decide what policy goals the defendant State should pursue and how it should pursue those goals. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree" of another State's court. *Id.*

This threat to state sovereignty is not merely hypothetical. At least five other tax cases have been brought against one State in a court of another State, including another lawsuit against California filed in Nevada, *see* Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014), and yet another against California in Washington. *See* Compl., *Satcher v. California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. June 17, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Massachusetts is currently being sued in Virginia state court over a recently promulgated sales and use tax regulation. Mass. Comm'r of Revenue's Mem. of Points and Auths. in Supp. of his Mot. to Dismiss for Lack of Personal Jurisdiction at 4, *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018). Similarly, Ohio has an appeal pending in the Kentucky Supreme Court concerning a commercial activity tax assessment. Motion to Transfer of Defs./Appellants State of Ohio & Joseph W. Testa, Tax Comm'r of Ohio at 1, *Great Lakes Minerals, LLC v. Ohio*, No. 2018-SC-000161-T (March 26, 2018) (granted unanimously, June 14, 2018). And South Dakota has been sued in

both North Dakota *and* Minnesota over a tax audit. Compl., *Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018); Compl., *Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18-80 (Minn. D. Ct. Mar. 7, 2018). Finally, Connecticut was sued in Texas state court by a taxpayer. Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13-08568 (Tex. D. Ct. Aug. 6, 2013).

Outside the tax arena, Ohio also is a defendant in an Indiana state court case arising out of a motor vehicle collision. Order Denying Summ. J., *Chilton v. Ohio Dept. of Transp.*, No. 15D01-1404-CT-019 (Ind. Sup. Ct. Dec. 19, 2016). North Dakota is currently defending against a contract dispute in Minnesota state court. Compl., *Rosewood Hospitality, LLC v. N.D. Dept. of Soc. Servs.*, No. 62-CO-18-538 (Minn. D. Ct. Feb. 27, 2018). Rhode Island has a family law case in Connecticut state court. Compl., *Reale v. R.I.*, No. WWM-CV18-5008257-S (Conn. Sup. Ct. Nov. 17, 2017). And Texas recently defended a medical malpractice case in New Mexico state court. *Montano v. Frezza*, 339 P.3d 700 (N.M. 2017).

Every case brought against one State in a court of another State undermines the defendant State's sovereignty, both in terms of the insult to sovereign dignity and in terms of the required expenditure of sovereign resources to litigate the matter. *See Alden v. Maine*, 527 U.S. 706, 751 (1999). States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political of judgments

must be made." *Id.* Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). In all cases, a limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.*

B. The insult to state sovereignty is particularly harmful in the tax context

While any case brought against a State against its will is an insult to its sovereignty, the Court has also recognized that vitiating sovereign immunity when the power to tax is at stake is particularly harmful, as "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty." *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 498 (2003). "[T]axes," the Court has recognized, "are the life-blood of government, and their prompt and certain availability an imperious need." *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 523 (1984) (quoting *Bull v. United States*, 295 U.S. 247, 259–60 (1935)).

The taxing power of States is so important that Congress has limited the ability of the federal judiciary to restrain it. The Tax Injunction Act of 1937 prevents federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The purpose of the

Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). It "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Such a substantive limit on the power of federal courts demonstrates the core status of the taxing power to the States.

For their part, States often limit the processes their own taxpayers may use to challenge assessments and audits. Of the forty-three States that have some form of income tax, many have an administrative review process that taxpayers must complete before seeking judicial review of an audit or assessment. *See, e.g.*, Ind. Code § 6-8.1-5-1. Many States require a final administrative decision to be appealed to a special tax court, rather than a court of general jurisdiction. *See, e.g.*, Ind. Code § 33-26-3-1; Ala. Code § 40-29-90. *See generally* All St. Tax Guide (RIA). For sales and use taxes, similarly, many States require administrative review before challenging an audit or assessment in state court. In Indiana, for example, a taxpayer must first file a protest with Indiana Department of Revenue before appealing to the Indiana Tax Court. Ind. Code § 6-8.1-5-1. In Illinois, to take another example, the taxpayer has the option of either filing a protest with the Department of Revenue, 35 Ill. Comp. Stat. 120/5, paying the tax and then filing a claim for a credit with the Department, 35 Ill. Comp. Stat. 735/3-2, or paying the tax under protest and then filing an action in state court, 30 Ill. Comp. Stat.

230/1. *See generally* Am. Bar Ass'n, *Sales & Use Tax Deskbook* (30th ed. 2016–17). *See also* Am. Bar Ass'n, *Property Tax Deskbook* (22nd ed. 2017) (showing specialized administrative review procedures for property tax assessments).

Channeling tax claims into administrative review or specialized courts is one way States safeguard core taxation authority. Accordingly, in Nevada and California—the two States with direct ties to this case—bypassing administrative review and immediately seeking judicial review of an audit (or the tactics used during an audit) is not permitted. In Nevada, a taxpayer must complete administrative review *and* pay the tax bill before seeking judicial review of an audit. Nev. Rev. Stat. § 360.395. In California, a taxpayer may either: (1) file an appeal with the Office of Tax Appeals (without paying the underlying tax), but only after filing a protest of the audit assessment with the Franchise Tax Board and the denial of that protest, or (2) first pay the tax (except in a residency case) and then file a claim with the Franchise Tax Board for a refund. *See* Cal. Gov't Code § 15677; Cal. Rev. & Tax. Code § 19381. If the Franchise Tax Board denies the claim or does not act within six months, the taxpayer may file a suit for a refund in the Superior Court. Cal. Rev. & Tax. Code § 19381.

California law also prevents "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code

§ 860.2. By suing California's tax authorities in Nevada courts while his administrative appeal remains pending, however, Hyatt has circumvented California's restrictions.

Hall thus undermines these administrative processes and the federal Tax Injunction Act by providing an end-run for plaintiffs around a State's tax enforcement system without requiring plaintiffs to abide by the carefully-crafted administrative procedures established by the taxing State. It also undermines the exercise of core state functions such as taxation, assessment, and audit by permitting a court from another State to overrule a State's policymaking and enforcement decisions. *Hall*, 440 U.S. at 425–27. By exercising jurisdiction over the taxation authority of another State, a forum-state court may make decisions that effectively determine what revenue goals the defendant State should pursue and how it should pursue them. Such lawsuits "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 750–51.

Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, treasuries, and policy priorities. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1279 (2016). As noted above, this case has already inspired other lawsuits in Nevada courts against FTB, which may force FTB to alter its enforcement policies.

To be sure, the Court in *Hyatt I* struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." 538 U.S. at 498. But that only means that the Court should not create different standards for different types of claims. The point remains that this case demonstrates the degree to which *Hall* opened the door not only to suits that seek compensation for other States' seemingly ordinary torts, but also for suits challenging other States' core policy and enforcement determinations that the courts of the forum State may find objectionable.

III. *Stare Decisis* Should Not Prevent the Court from Overruling *Hall*

Where, as here, the Court must consider whether to overrule a prior decision, it must also grapple with the principle of *stare decisis*. However, "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Instead, the Court's reconsideration of a prior holding must be "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law," including (1) "whether the rule has proven to be intolerable simply in defying practical workability;" (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;" (3) "whether related

principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;" and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.*

First, the sheer number of lawsuits against States in the courts of other States demonstrates the practical unworkability of *Hall*, particularly as it belies the sufficiency of the "comity" expectation articulated in *Hall*. *See supra* Parts I.A and II.A. This case alone represents the culmination of over twenty years of litigation and three trips to the Supreme Court. And it is far from the only case of its type. The State of Nevada—the very State whose courts chose to exercise jurisdiction in this case—both joined other States urging the Court to take this case to revisit *Hall* the last time around, Brief of Amici Curiae State of West Virginia and 39 Other States in Support of Petitioner, *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016) (No. 14-1175), *and* recently filed its own cert. petition asking the Court to overrule *Hall*. Petition for Writ of Certiorari, *Nevada Dep't of Wildlife v. Smith*, No. 17-1348 (Mar. 21, 2018). The States' nearly uniform opposition to *Hall* illustrates the need for a different outcome.

Second, *Hall* implicates no reliance interests. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Casey*, 505 U.S. at 855. As should be obvious, potential plaintiffs do not structure their personal or economic interests or choices on the ability to sue another State

in the courts of their home State. Who contemplates the possibility of having a tort claim against a State where they do not live, let alone strategizes where they would bring such a hypothetical claim? Nobody. Similarly, States do not structure their court systems around the ability to entertain suits against other States, and they do not enact tort claim procedures with other States in mind. Indeed, after *Hyatt II*, state courts may not afford other States less protection from claims than they afford their home States. 136 S. Ct. at 1281. So, even if state courts wished to take specific account of how they would handle suits against other States in reliance on *Hall*, it is not clear what actions they could take.

Third, *Hall* is a "remnant of the abandoned doctrine" that the Eleventh Amendment defines the outer limits of state sovereign immunity. *See* Part I.C *supra*. The Court has long "recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (internal citations omitted). Overruling *Hall* is necessary to bring state immunity from suit in the courts of other States in line with the rest of this Court's sovereign immunity doctrine.

Finally, although the facts and reasons underlying state sovereign immunity have not changed, the numerous lawsuits against States in other States' courts has demonstrated the extent of *Hall*'s insult to state sovereignty. The "prevailing notions of comity" that

the Court invoked in *Hall* to protect States from such suits are insufficient. 440 U.S. at 419.

***

Just as the Court in *Seminole Tribe* overruled *Union Gas* because it was a "solitary departure from settled law, 517 U.S. at 66, so too should the Court overrule *Hall*. "[N]one of the policies underlying stare decisis require [this Court's] continuing adherence to its holding." *Id.* *Hall* "depart[s] from our established understanding of the Eleventh Amendment and undermine[s] the accepted function of Article III." *Id.* Consequently, the time has come for this Court to overrule *Hall*.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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No. 17-1299

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae, who are listed in the Appendix, are professors of constitutional law, civil procedure, conflict of laws, and other legal fields. They have an interest in the proper development of structural constitutional law, including the doctrine of state sovereign immunity. *Amici* offer their views on whether the Court should overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979).*

SUMMARY OF ARGUMENT

Nevada v. Hall, 440 U.S. 410 (1979), which rejected the principle of interstate sovereign immunity, was wrongly decided and should be overruled. The discussion here proceeds in two parts.

I. *Hall* conflicts with constitutional text, structure, and history. Ratification occurred against a historical understanding that states could not hale non-consenting sister states into their courts. Constitutional text and structure embrace this principle of interstate sovereign immunity both by preserving the immunity and by prohibiting its abrogation at the hands of sister states.

Under the Constitution, states maintain core attributes of sovereignty, including a robust conception of sovereign immunity. The selection of the word "state" may support this notion. And the Eleventh Amendment, which forbids the adjudication of any suit against a state by a citizen of another state in federal court, makes little sense if states are not also immune from suit in sister-state courts. "[T]he sovereign

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* The parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

immunity of the states neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Instead, the purpose of the Eleventh Amendment was to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that a South Carolinian could sue Georgia in federal court. As Justice Blackmun stated when dissenting in *Hall*, "[i]f the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a higher sovereign—how much more must they have reprehended the notion of a State's being haled before the courts of a sister state." 440 U.S. at 431 (Blackmun, J., dissenting).

In addition, the Constitution limits the power that each state may exercise. Some of these limitations are structural, including the principle that because states are coequal sovereigns, they may not exercise legislative power over one another to decide interstate disputes. For similar reasons, states generally may not exercise judicial power over one another by haling sister states into their courts.

The principle of interstate sovereign immunity was well accepted among the founding generation. Both the Federalists and the Antifederalists premised their arguments for and against the Constitution on the assumption that states could not be sued in sister-state courts (or in any courts) without their consent. This understanding was on full display in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). By holding that Virginia could not be haled into a Pennsylvania court without its consent, *Nathan* echoed the dominant sentiment at the time—that states were immune from suit in the courts of sister states.

II. Forum states cannot abrogate the sovereign immunity of sister states. Professor William Baude's recent argument to the contrary, *see* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017), is therefore incorrect.

Among other issues, this argument does not adequately address the contention that Article III's "provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts." Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 266. And Baude's attempt to rescue *Hall* by suggesting that a state could fend off a plaintiff from enforcing a default judgment in the state's own courts fails to take appropriate account of the dignitary interests that support sovereign immunity and seems difficult to square with principles relating to the Full Faith and Credit Clause.

In short, the Court should overrule *Hall* and recognize the important constitutional principle of interstate sovereign immunity.

ARGUMENT

In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court rejected the principle of interstate sovereign immunity by holding that states can hale non-consenting sister states into their courts. Scholars of constitutional law have long argued that this holding was erroneous. *See, e.g.*, Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 Cornell L. Rev. 253 (1985); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249. The time has come for the Court to overrule *Hall* and hold that interstate sovereign immunity generally protects states from suit in sister-state courts.

This brief makes two arguments. First, *Hall* was wrongly decided as a matter of constitutional text, structure, and history. Second, the contention that forum states can abrogate the sovereign immunity of sister states is incorrect. The Court should thus abandon *Hall* and hold that interstate sovereign

immunity represents a fundamental part of our constitutional system.

I. Constitutional text, structure, and history all support the principle of interstate sovereign immunity.

Interstate sovereign immunity was well known and well accepted at the time of the founding. Constitutional text, structure, and history all support the proposition that states generally cannot hale sister states into their courts.

A. Constitutional text and structure embrace the principle of interstate sovereign immunity.

As described below, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *supra*, at 263. Constitutional text and structure adopt this background assumption in two ways: by preserving interstate sovereign immunity and by prohibiting states from abrogating the immunity of sister states.

First, the Constitution secures the fundamental sovereign prerogatives of the several states. *See Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("It is incontestible that the Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" (some internal quotation marks omitted) (citations omitted) (quoting *The Federalist No. 39*, at 245 (J. Madison) (Clinton Rossiter ed., 1961)). Sovereign immunity is one such prerogative. *See* Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 Colum. L. Rev. 213, 220 (2006) ("As the Court made emphatically clear . . . , the Constitution had in fact

established the rule of state sovereign immunity even before the ratification of the Eleventh Amendment." (citing *Alden v. Maine*, 527 U.S. 706, 715–19, 754 (1999)).

Indeed, there is reason to think that interstate sovereign immunity is inherent in the word "state." At the founding, this word "denoted an independent country that possessed complete or a significant degree of sovereignty." Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 821 (1999). So the Constitution's use of "states" (rather than "counties" or "districts") "strongly suggests that [the Framers] intended these governments to retain a significant degree of sovereignty," including immunity from suit in sister-state courts. *Id.* at 821–22. And this is so even if one sees the term as a "shorthand for structural considerations" rather than as a "font of meaningful textual analysis." Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 Wm. & Mary L. Rev. 1601, 1624 (2000).

Moreover, the Eleventh Amendment—which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI—makes little sense absent a background of interstate sovereign immunity.

The Eleventh Amendment was an "explanatory amendment," meaning one designed to "correct or clarify ambiguities in the law." James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1315 (1998). In particular, the amendment was aimed at abrogating *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had allowed a South Carolina citizen to sue the State of Georgia in federal court. *See* Pfander, *History and State Suability*, *supra*, at

1279–80; *see also* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1896–99 (2010).

Accordingly, "the narrow scope of the [Eleventh] Amendment is easily explained by the fact that it was only intended to overrule *Chisholm*. It was not necessary to establish sovereign immunity more generally, because the original Constitution had already done so." Rappaport, *supra*, at 872; *see Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) ("If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a higher sovereign—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State. The concept of sovereign immunity prevailed at the time of the Constitutional Convention. It is, for me, sufficiently fundamental to our federal structure to have implicit constitutional dimension." (internal quotation marks and citation omitted)); *id.* at 437 (Rehnquist, J., dissenting) (stating that "it is . . . clear that the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions, for . . . they would have otherwise perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States"); *id.* at 432–33 ("I think the Court's decision today works a fundamental readjustment of interstate relationships which is impossible to reconcile . . . with . . . the logic of the constitutional plan itself.").

This Court has thus long recognized that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Instead, the Court has declared, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and

which they [generally] retain today." *Id.*; *see, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) ("[T]he [Constitutional] Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework."); *Hans v. Louisiana*, 134 U.S. 1, 10, 16 (1890) (rejecting the plaintiff's argument that "being a citizen of Louisiana," he was "not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state" because "[t]he suability of a state, without its consent, was a thing unknown to the law"); *see also* Br. for Pet'r 26–28.

Because "the original Constitution" "establish[ed] sovereign immunity more generally," Rappaport, *supra*, at 872, interstate sovereign immunity represents a kind of lesser-included immunity within a well-accepted system of constitutional immunity principles. States, for instance, are generally not suable in their own courts absent consent. *See Alden*, 527 U.S. at 754. Nor are they generally suable in federal courts absent consent. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). It would be illogical for immunity principles to protect states from suit in their own courts and federal courts but not in the single class of forums most likely to exhibit hostility toward their interests: sister-state courts. *See* Simson, *supra*, at 262–63 (arguing that the framers were likely more concerned about suits in state courts than federal courts "in light of the less neutral nature of state tribunals"); *see also* Br. for Pet'r 40–42.

Second, the Constitution limits each state's power. Some limitations are textual. *See, e.g.*, U.S. Const. art. I, § 10 (listing multiple limitations). And some limitations are structural. For example, because "implications from the constitutional structure" render states "coequal sovereigns," "neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other." Bradford R. Clark, *Federal*

Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1325 (1996); *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 Wm. & Mary L. Rev. 655, 713 (2013) ("Disputes between states are beyond the authority of either state to resolve . . . ."); Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 508 (2006) (explaining that "commentators have agreed that the Constitution implicitly strips the states of lawmaking power" over boundary disputes and water disputes, such that a state "cannot authoritatively resolve the dispute simply by passing a statute arrogating all of the disputed territory or water to itself").

Congress can abrogate state sovereign immunity in certain circumstances. *See Alden*, 527 U.S. at 756 ("[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power."). But other states cannot. Just as the Constitution forbids states from reaching beyond their borders to exercise legislative power over one another by the means discussed above, the Constitution forbids states from reaching beyond their borders to exercise judicial power over one another by haling sister states into their courts (where, as here, Congress has not abrogated state sovereign immunity). *See* Woolhandler, *supra*, at 265 ("Article III's provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts, and would be decided (most likely in the Supreme Court) as a matter of what would be effectively federal law, not state law."); *see also* Br. for Pet'r 35 ("By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes.").

In short, the Constitution's text and structure confirm that the historical principle of interstate sovereign immunity represents a fundamental aspect of our governmental system. It is to that historical principle that the discussion now turns.

B. The founding generation recognized the historical principle of interstate sovereign immunity.

"[T]he framers understood the law of nations to deprive the state courts of the power to hear" "suits against the states." James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 635 (1994). Indeed, "the impossibility of unconsented *in personam* suits against states in the courts of other states was a foundation on which all sides of the framing era debates" agreed. Woolhandler, *supra*, at 253.

A few examples must suffice here. Edmund Pendleton—who was the president of the Virginia Ratifying Convention—declared during the convention that "calling a sovereign state before the jurisdiction of another sovereign state" was an "impossibility." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Jonathan Elliot ed., 1836), *quoted in* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 635. And Edmund Randolph—who was a delegate to the Constitutional Convention, governor of the Commonwealth during the Virginia Ratifying Convention, and later the first attorney general of the United States—made similar remarks when advocating ratification. *See* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 635–36. Randolph also wrote in a 1790 report to Congress that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 *The Documentary History of the Supreme Court of the United States, 1789–1800: Organizing the Federal Judiciary* 130 (Maeva Marcus ed., 1992), *quoted in* Pfander, *Rethinking Original Jurisdiction*, *supra*, at 637; *see* Br. for Pet'r 23–25

(exploring the larger context of the ratification debates and discussing statements made by Alexander Hamilton, by James Madison, and by John Marshall arguing that Article III did not permit plaintiffs to bring suits against non-consenting states).

Antifederalists agreed. For they adhered to the view that, before ratification, states were "not . . . suable in *any* court absent consent." Woolhandler, *supra*, at 257 (emphasis added); *see* Br. for Pet'r 23 (discussing statements made by the Federal Farmer and by Brutus).

The principle of interstate sovereign immunity animated the famous pre-ratification case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), where a Pennsylvania court dismissed a suit brought by a Pennsylvania citizen against the Commonwealth of Virginia. There, William Bradford—who was then the attorney general of Pennsylvania and later succeeded Randolph to become the second attorney general of the United States—"urged simply, and successfully, that the issuance of process to Virginia violated the law of nations, which regarded each sovereign as equal and independent and thus immune from suit in another sovereign's courts." Pfander, *Rethinking Original Jurisdiction*, *supra*, at 585–86.

Nathan, moreover, carried great "significance to the men who framed the Constitution":

> Nathan was represented . . . by none other than James Wilson, . . . the guiding force behind both the Pennsylvania constitutional provision that authorized suits against that state and the Original Jurisdiction Clause of the Constitution. Among the Virginia delegates who signed communiques with the Pennsylvania Supreme Executive Council was James Madison. Letters from Thomas Jefferson, the sitting governor of Virginia at the time, reflect his interest in the case; he was at least sufficiently concerned to

> request of . . . Pendleton . . . his opinion of the case's merits.

Id. at 586–87 (footnotes omitted). At bottom, "[t]he disposition of *Nathan* in favor of law-of-nations immunity deserves to be viewed as a decisive rejection of state suability in the courts of other states" during the pre-ratification period. *Id.* at 587; *see id.* at 587 n.127 (explaining that "[m]uch the same result was reached in a Pennsylvania admiralty court decision from the same period" (citing *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697))).

As described above, the text and structure of the Constitution reflect the adoption of this foundational principle. Petitioner is thus correct to contend that "a considerable body of historical evidence" supports the proposition that interstate sovereign immunity is an inherent part of our constitutional scheme. Br. for Pet'r 20 (explaining that "[f]irst, States were immune from suit in each other's courts during the pre-ratification era"; "[s]econd, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before"; and "[t]hird," among other things, "the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts").

II. The argument that forum states can abrogate interstate sovereign immunity is incorrect.

In a recent article that raises important considerations, Professor William Baude argues that *Hall* was correct to allow a state to hale a non-consenting sister state into its courts. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017). Baude's argument deserves consideration. But it is ultimately unconvincing.

Baude characterizes interstate sovereign immunity as a "constitutional backdrop." *Id.* at 8. He contends, however, that forum states can abrogate the sovereign immunity of sister states. *Id.* at 24–28. "The Constitution doesn't limit states to enumerated powers and imposes relatively few constraints on their treatment of one another," Baude argues. *Id.* at 24. So because no particular constitutional provision prohibits one state from nullifying the sovereign immunity of another, Baude contends that such nullification is permissible. *See id.* at 25–28.

Baude recognizes the potential perversity of *Hall*'s holding that states are suable in the most hostile forums in the nation, sister-state courts. *See id.* at 28–29. He attempts to head off this difficulty, however, by arguing that a state can decline to appear in a sister-state court and then argue that the resulting default judgment is unenforceable when the plaintiff comes to collect in the state's own courts. *See id.* at 29 (stating that the forum state "might discover that its judgments encounter serious legal and practical obstacles elsewhere").

Baude's argument is misguided. As explained above, the Constitution both preserves interstate sovereign immunity and prohibits states from abrogating the immunity of sister states. *See supra* Part I.A.

Baude, moreover, fails to take seriously enough the argument that Article III's "provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts." Woolhandler, *supra*, at 265. Baude simply deems it "unlikely" that Article III would have stripped states' powers to abrogate sister-state immunities without expressly saying so, especially if Article III also preserved states' preexisting immunities. Baude, *supra*, at 27.

Far from unlikely, the former is totally consistent with the latter because certain immunity principles represent part of the "residuary and inviolable sovereignty" of states, *Printz*, 521 U.S. at 919, but any power to abrogate such principles does not. *See Alden*, 527 U.S. at 713 (stating that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *see also* Br. for Pet'r 34 (stating that "States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States," but arguing that those interests "must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States"—and that "[t]here is little question which of those competing interests carried greater weight at the time the Constitution was ratified").

Baude's argument about default judgments cannot salvage *Hall*. Advocating unenforceability ex post is by no means an adequate substitute for asserting sovereign immunity ex ante. If it were, then sovereign immunity would serve little meaningful function in the international context. But, of course, recognizing the "equal dignity" of a foreign sovereign "depends on the forum nation's courts' declining to assert jurisdiction" in the first place. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 6 (2003) (internal quotation marks omitted). This Court has accordingly made clear that sovereign immunity is an immunity from suit, not a mere defense to liability. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145–46 (1993). This means that sovereign immunity is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (concerning qualified immunity); *see Metcalf & Eddy*, 506 U.S. at 145 (comparing sovereign immunity to qualified immunity in this regard); *see also* Br. for Pet'r 36–39 (discussing the weighty dignitary and self-government interests served by sovereign immunity).

Moreover, it is unclear why, under longstanding principles articulated by this Court, the Full Faith and Credit Clause would not require a state's own courts to recognize a sister state's default judgment. After all, there is "no roving 'public policy exception' to the full faith and credit due judgments." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *see Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (Holmes, J.) (rejecting the notion that "the illegality of the original cause of action in [one state] can be relied upon there as a ground for denying a recovery upon a judgment of another state"). To be sure, "[a] State is not required . . . to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties." *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (internal quotation marks omitted). But Baude does not seem to think that any limitations on the enforceability of a judgment in this context sound in subject-matter jurisdiction. And to the extent that he suggests that such limitations sound in personal jurisdiction, his argument would require a fundamental shift in this Court's frame of reference. *See Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (stating that "modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction" would require a "substantial revision").

In sum, constitutional text, structure, and history all support the principle of interstate sovereign immunity, and one state cannot abrogate the sovereign immunity of another.

CONCLUSION

For the foregoing reasons, this Court should overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979).

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APPENDIX

APPENDIX

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No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
PETITIONER,

V.

GILBERT P. HYATT,
RESPONDENT.

On Writ of Certiorari
to the Supreme Court of Nevada

BRIEF AMICUS CURIAE OF ALAN B. MORRISON & DARIEN SHANSKE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

Amicus curiae Alan B. Morrison is an associate dean at the George Washington University Law School where he teaches civil procedure and constitutional law. Amicus curiae Darien Shanske is a professor at the University of California, Davis School of Law, and teaches state and local taxation. Neither amicus has any interest, financial or otherwise, in the outcome of this lawsuit. They are participating as amici in order to offer their views on the issues before the Court which differ from those of the parties and, they believe, those of other amici.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by the petition is whether this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), should be overruled. Amicus agrees that *Hall* correctly held that Nevada was subject to suit in the courts of California and that the Nevada statute limiting the liability of the State in that situation to $25,000 did not preclude the judgment of $1,150,000 entered by the California courts. The principal reason why *Hall* was correctly decided is that the accident that injured the plaintiff in *Hall* occurred on California roads as a result of the negligent driving of an

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[1]This brief is filed pursuant to blanket consents provided by all parties. No person other than an amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

employee of the University of Nevada (a state institution) who was driving a university vehicle on university business at that time. No principle of constitutional law allows one state to immunize itself for wrongful conduct of its agents in the territory of another state. Nor does a state's limit on the amount of damages that it can be assessed in its own courts carry over to the courts of another state. Having chosen to send its employee into California, the State of Nevada had no constitutional basis to object to being sued in California, nor to having California applying its laws compensating victims for injuries that the Nevada employee caused there.

But this case involves facts very different from those in *Hall*, where the events giving rise to liability all occurred in California, the same state where the suit was brought. In this case, by contrast, most if not all of the allegedly wrongful conduct giving rise to the judgments based on claims of fraud and intentional infliction of emotional harm occurred in California, not in Nevada where this case was brought. Because of this difference, this Court need not decide whether *Hall* should be overruled, but if it does reach that question, *Hall* should be re-affirmed.

However, there are very troubling aspects of the rulings below that should not stand. This case is an effort by respondent to recover damages for what he considers to be highly improper treatment of him by agents of petitioner Franchise Tax Board. Petitioner is the entity responsible for deciding disputes about how much an individual such as

respondent must pay in California income tax for the time when that individual was a California resident. Because the focus of the appellate record in this case was not directed at the location of the conduct that respondent alleged gave rise to his claims, a remand may be necessary to make a final determination of where the alleged wrongful conduct took place. But assuming that most if not all of it occurred in California, there are two separate, but inter-related reasons why petitioner, which is an agency of the State of California, could not be sued over these claims in Nevada.

First, the Nevada courts had no authority to tell petitioner – under pain of paying damages for disagreeing – how to conduct its audit proceedings regarding respondent's California income tax liabilities for the period when respondent was a California resident. The Nevada courts properly rejected respondent's efforts to have them determine the residence question that was at the center of the California litigation, and they also should have rejected respondent's effort to set down the rules by which petitioner must conduct its audits. Due Process precludes Nevada from applying Nevada law to the conduct of petitioner arising out of its audit of respondent's taxes where that conduct did not take place in Nevada. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1984). Just as Nevada could not legitimately dictate to California the rules by which Nevada residents drive their cars in California, so too Nevada cannot, under the guise of protecting its citizens, tell petitioner what it may and may not do outside Nevada in auditing respondent's California

tax returns. Because the judgments below were founded on an unconstitutional extra-territorial application of Nevada law to proceedings before a California state agency, they cannot stand. [2]

Second, as is required for every case, unless waived, there must be personal jurisdiction over the defendant. The question presented does not include a claim of lack of personal jurisdiction, but that does not necessarily preclude the Court from deciding the case on that basis. In any event, the Court's personal jurisdiction jurisprudence has changed since this case began over twenty years ago, and it would be appropriate for the Court to remind state courts that the rules regarding personal jurisdiction apply to suits against government entities as well as those against corporations and individuals.

Under this Court's recent decisions, general jurisdiction would not be available against petitioner since it is plainly "at home" only in

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[2] Respondent was a Nevada resident when this case was brought, but he was indisputably a California resident for at least the first nine months of 1991. His claim that he became a Nevada resident in October 1991 is the basis of the tax dispute pending before petitioner. As a result of the audit that petitioner conducted for 1991, it concluded that respondent did not become a Nevada resident until April 1992, and so asserted income tax liabilities against him for that portion of 1992. The legitimacy of that assertion is not at issue in this case. As far as amicus can determine, the alleged wrongful acts by agents of petitioner related to both tax years, and so for reasons of simplicity, this brief will treat all of the alleged wrongful conduct as arising from the audit of his 1991 California income tax return.

California. While there previously might have been a basis under *International Shoe v. Washington*, 326 U.S. 310, 317 (1945), to obtain general jurisdiction over the Franchise Tax Board or the State of California itself based on their "continuous and systematic" activities in Nevada, that test no longer suffices for general jurisdiction. The only option available for respondent would be specific jurisdiction, which would require that the factual basis for his claims arise from, or be directly related to, activities of petitioner in the State of Nevada. While there appear to be some acts undertaken by agents of petitioner in Nevada, they fall far short of being sufficient to support respondent's broad claims for fraud and intentional infliction of emotional harm whose locus is in California. The heart of respondent's claims involved conduct relating to petitioner's examination of respondent's tax return which were initiated in California, although their effects may have been felt by respondent in Nevada after he moved there. Those effects, however, are not sufficient to sustain specific jurisdiction over the vast majority of the claims here. *See J. McIntyre Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Walden v. Fiore*, 571 U.S. 277 (2014). At the very least, specific jurisdiction can be upheld only based on a close analysis of petitioner's activities in Nevada and their relations to the claims that respondent had made.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED.

A. *NEVADA V. HALL* WAS CORRECTLY DECIDED.

There is nothing problematic about the outcome in *Nevada v. Hall*. The facts involved a commonplace automobile accident in California in which the driver of the car that injured the plaintiff was from out of state and suit was brought in a California state court. At least since *Hess v. Pawloski*, 274 U.S. 352 (1927), there would be no question of personal jurisdiction over that defendant. The driver in *Hall* was an employee of the University of Nevada, a state university, who was driving a university car on university business at the time of the accident. For that reason, the complaint named the University and the State of Nevada as defendants. There would have been no question of immunity from suit by any of the defendants if the driver had been employed by a private university or by the University of California. This Court correctly ruled in *Hall* that no different outcome was required because the State of Nevada was a defendant.

In addition to all of the immunity cases cited by the majority in *Hall*, that decision is consistent with basic principles of law as well as common sense. Those principles include the right of each state, subject to limits in the Constitution, to establish the laws that apply within its territory.

Those laws include those creating liability for wrongful or negligent acts in that state, and so Nevada could not, for example, object that California's speed limits were too low or that its law provided for comparative and not contributory negligence. The same principle applies to the laws making a principal responsible for the acts of its agent or the owner of a car liable for the negligence of a person who was authorized to drive it. When Nevada chose to send its employee into California, Nevada could not object to non-discriminatory California laws, including that the employer of the negligent driver was legally responsible for the harms that the driver caused.

The fact that Nevada did not "consent" to be sued in California courts for this accident was irrelevant. If Nevada does not like those California laws, it can simply not allow its employees to drive there, and its decision to send its employee to California is all the "consent" that the Constitution requires for the court where the accident took place to obtain personal jurisdiction over the out-of-state driver and the owner of the vehicle. *Hess*, 274 U.S. at 356 (upholding "implied consent" to suit against out-of-state driver). Thus, the decision in *Hall* sustaining the right to sue Nevada on account of the accident at issue there was plainly correct and should not be overturned. Indeed, without the protections of *Hall*, California citizens, injured in their own state by employees of other states, would be forced to sue in a state which has no relation to their injury and be subject to the laws and immunities of the other state.

There was a second immunity claim in *Hall* that was also properly resolved for essentially the same reason. Under Nevada law, the State was not liable for damages in excess of $25,000 if the suit had been brought in Nevada. The State argued that the cap on liability was a form of immunity and that it had to be honored by California courts. That defense was also properly rejected. Just as Nevada cannot export any absolute immunity it might have under Nevada law, it cannot export any limits on the amount of damages that it has "consented" to pay when the conduct giving rise to its liability occurs outside of Nevada. Surely, if Nevada had a law like the federal Westfall Act, 28 U.S.C. § 2679(b), under which federal employees are not liable for their torts, but the United States is, the employee who committed a tort outside the state could not rely on that law to claim immunity in the courts of that other state. The converse situation, reflected in the facts of *Hall*, does not require a different result.[3]

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[3] As this Court previously ruled in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), if California had a limit on liability applicable either to employers generally or to the State as employer, that level of protection would also have had to be afforded to Nevada in *Hall*.

B. *HALL* DOES NOT SUPPORT THE JUDGMENT IN THIS CASE.

1. The Nevada Courts Could Not Constitutionally Apply Nevada Law to Proceedings Before a California State Agency.

The heart of respondent's liability claim is that petitioner behaved so badly toward respondent in conducting the audit of his 1991 California income tax return that it must pay him $100,000 in damages. That assessment of petitioner's conduct in pursuing the California audit was based solely on Nevada law, as respondent never claimed that petitioner had engaged in conduct that violated California law. In *Hall*, all the relevant acts of the defendant occurred in the state where the case was brought, and the courts applied the law of the state where those acts occurred. However, in this case, respondent's Statement of the Case from his brief the last time that this case was before this Court (reproduced in the Addendum) shows that the vast majority of the acts of petitioner's employees that allegedly caused harm to respondent took place in California, not Nevada, rendering the use of Nevada law unconstitutional as a violation of due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1984).

Those alleged wrongful acts fall into four geographic categories: (1) acts that took place wholly in California, such as inquiries from petitioner that were directed to respondent or third parties, that petitioner believed might have

information relevant to respondent's income tax liabilities, when those persons were, at the time the inquiries were made, physically in California; (2) acts that emanated from California, but were directed to third parties outside of California, such as a request for information from, or a disclosure to, such persons; (3) a request for information made by an agent of petitioner in California directed to respondent in Nevada; and (4) acts taking place wholly outside of California, primarily in Nevada, such as the allegation that agents of petitioner peered into respondent's home, or rummaged through his garage, as part of their audit of respondent.

The essence of the disagreement between the parties relates to whether the manner in which petitioner conducted the audit of respondent's tax returns was proper, or constituted fraud or the intentional infliction of emotional injury on respondent. The Nevada courts found for respondent by applying Nevada law to adjudicate the legality of the manner in which a California agency reviewed respondent's tax returns, and in applying Nevada law, it erred. In these circumstances, with the exception of acts in category (4) above, the legality of petitioner's conduct should have been judged as a matter of California, not Nevada law. No case let alone any provision of the Constitution authorizes one state (Nevada) to dictate that its laws may apply to conduct that took place in the territory of another state (California), let alone that sought to mandate the manner in which that other state carried out an essential governmental function, here collecting

the taxes owed to it. For this reason, the Court need not delve into any immunity that petitioner might have, but can set aside the judgment because Nevada unconstitutionally applied Nevada law to respondent's claims against petitioner based on conduct that took place principally in California.

The flaw in Nevada's attempted usurpation of the authority of California to enact the substantive laws that apply within its borders can be seen from *Pennoyer v. Neff*, 95 U.S. 714 (1874). In concluding that the state court there lacked personal jurisdiction in the original suit brought against Neff, the Court observed, in language fully applicable here, that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse." *Id.* at 720. Subject to any limits imposed by the Constitution, such as the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of Article IV, § 2, cl. 1, the State of California, just like Nevada and every other State, is free to conduct its procedures for the imposition and collection of income taxes owed to it by whatever procedures its laws provide. On that subject, the State of Nevada has nothing legitimate to say. The failure of the Nevada courts to recognize this principle resulted in a very significant judgment – in both financial and public condemnation terms – against petitioner for conduct that complied with California law and the

United States Constitution. That judgment must be reversed.

This Court has made clear that, while states have considerable latitude in deciding which state laws to apply in cases properly before them, the Due Process Clause does impose some outer limits. Thus, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1984), this Court held that a Kansas state court could not constitutionally apply its law governing the rate of interest payable for late payments for royalties on leases held by the plaintiff class when "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit" and the defendant was incorporated in Delaware and had its headquarters in Oklahoma. *Id.* at 815. That same Due Process limitation on applying Nevada law to tax audit proceedings that took place before a California state agency, and that related to liabilities under California law, should have, but did not, preclude the Nevada courts from applying its laws to acts, 97% of which occurred outside of Nevada. *See Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494 (2003) (recognizing authority of Nevada to apply its laws, but only "with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders").

Surely, if the Nevada legislature enacted rules purporting to govern how the California Franchise Tax Board conducts its audits and other proceedings for individuals who claim Nevada

residence, they would be struck down as an unconstitutional usurpation of the authority of California to control the proceedings before its own state agencies. Yet the effect of this tort judgment has precisely the same prohibited effect on petitioner and the state of California. As this Court observed in a case involving a conflict between a federal and a state regime, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

Another example of this Court striking down a state's attempt to apply its laws to conduct in another state is the decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The plaintiff had persuaded the state court to allow the jury to consider the acts of the defendant in other states under the law of the forum state in assessing punitive damages against the defendant. Among other rulings on punitive damages, the Court expressly rejected that extra-territorial application of the forum state law:

> A State cannot punish a defendant for conduct that may have been lawful where it occurred. [*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)] *supra*, at 572; *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of

> another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) . . .; *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

State Farm, 538 U.S. at 421. If applying local law to out-of-state conduct offends due process when the defendant is a private company or individual citizen, it is surely more offensive to due process and federalism when the defendant is an out-of-state agency seeking to enforce its own laws.

A similar result, albeit in a different but related context, was reached in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). The Illinois statute at issue sought to regulate the means by which an out-of-state corporation made a takeover bid for an Illinois corporation (as defined by that statute). The law was challenged on federal preemption grounds, not relevant here, and Dormant Commerce Clause grounds, which formed the basis of setting the law aside. Three Justices concluded that the case was moot and hence did not reach the merits. A majority concluded that the law imposed an excessive burden on interstate commerce and therefore was invalid under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), while four Justices concluded that the Illinois law was invalid because it was "a direct restraint on interstate commerce

and that it has a sweeping extraterritorial effect." 457 U.S. at 642. The Court further observed that the "Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" and that the "limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Id.* at 642-43. These authorities make it clear that, if Nevada attempted to regulate, for example, the manner in which a California company dealt with complaints from its employees, it would be barred from doing so, even if the employee in question were a Nevada resident. Again, the extraterritorial intrusion on the sovereignty of another state here is even more improper because it was directed at an agency of another state.

The error of the Nevada courts in using Nevada law to judge the propriety of a California state tax audit can also be understood by applying what Nevada did here to the converse situation in *Hall*. Suppose that the Nevada speed limit at the time of the accident there was 75 mph, while the California had a limit of 50 mph where the accident happened. Could an employee of the State of Nevada successfully argue that he was entitled to drive at 75 mph instead of the 50 mph mandated by California? Of course not. Similarly, if a defendant in a negligence case in Nevada were entitled to six preemptory challenges in selecting a jury, that would not have entitled a Nevada defendant in a case like *Hall* to six challenges if California law provided for only three. For the

same reason, if petitioner has different rules on discovery or cross-examination than does the comparable tax agency in Nevada, respondent would have no basis to argue that his Nevada rights are being violated, whether he does so in the proceeding itself or by way of collateral attack through a claim for money damages for petitioner's failure to follow Nevada law, as respondent did here.

The law in a related area confirms the illegitimacy of what the Nevada courts did here. This past term, this Court considered the question of whether a state could impose an obligation on out-of-state sellers of goods shipped into the state to collect a use tax that was lawfully owed by the purchaser who resided in that state. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). All nine Justices agreed that the prior ruling, under which that duty to collect was lawful only if the seller had a physical presence in the collecting state, was not a correct interpretation of the Dormant Commerce Clause. However, the Court divided over whether the prior ruling should be overturned because of their differing views over how to apply stare decisis there. In the course of agreeing that South Dakota could enforce its law, the Court did not overturn the requirement that there be a "nexus" between the conduct of the out-of-state seller and South Dakota. Rather, it found that the requirement was satisfied by the action of the seller in sending its products into South Dakota at the request of a South Dakota resident. *Id.* at 2099.

But suppose instead that South Dakota had sought to require out-of-state sellers to collect its use tax not only when sellers sent their products into South Dakota, but also when the South Dakota buyer took delivery at the seller's location in another state. That effort would fail because there would be no nexus between the actions of the seller and South Dakota, just as there was no nexus between what almost all of what petitioner's agents did during the audit of respondent's 1991 income tax return and the State of Nevada here.

Ironically, the Nevada courts refused to entertain respondent's efforts to have them declare that he was a Nevada, not a California resident during the disputed time period, but they nonetheless upheld his claim that Nevada law protected him from the acts of petitioner's agents in enforcing California's tax laws. The fact that Nevada sought to impose legal obligations on an agency of a sister state, rather than on a private party, only serves to make its effort to export its laws more of an affront to our federal system. Amici agree that there would be the required nexus between Nevada's laws and petitioner for those acts, such as peering into respondent's window, looking through his garbage, or making unlawful disclosures about respondent to Nevada residents, but they are few and far between among respondent's grievances against petitioner. To be sure, even if respondent does owe California for unpaid income taxes, that does not mean that petitioner was free to use any tactics it chose to collect the amounts owed. But to prevail on those claims, respondent must rely on the laws of

California, a federal statute, or the Constitution, and not Nevada law as he did here.

2. Properly Applying Principles of Personal Jurisdiction May Readily Resolve This and Other Similar Cases.

The grant of certiorari in this case is at least as important for future cases, in which other states may seek to impose their laws on the agencies of another state, as it is to enable petitioner here to avoid paying the $100,000 in damages (and perhaps attorneys' fees and costs) which the Nevada courts upheld. Accordingly, amici suggests that it would be appropriate for the Court to point out that the defense of lack of personal jurisdiction may now be available to state agencies to avoid having to decide the choice of law issue here, even if its applicability was less clear in 1998 when this case was filed.

Petitioner timely moved to dismiss for lack of personal jurisdiction over it in the Nevada state courts, but it withdrew that motion and hence the defense may not have been properly preserved. Moreover, whether that motion would have succeeded then is unclear. However, in the interim, the law of personal jurisdiction has evolved considerably in ways that make it much harder for plaintiffs to keep an out-of-state defendant in court. Amici recognize that the question presented in the petition does not include the personal jurisdiction defense, and they take no position on whether this Court could properly resolve this case on personal jurisdiction grounds, or whether it

should remand the case for the Nevada courts to decide that question. In any event, the Court surely could make clear in its opinion that, in cases like this, the state court must assure itself that it has personal jurisdiction over an agency of another state.

Hall involved an automobile accident that occurred entirely in the jurisdiction in which the suit was filed, and so there was no issue of personal jurisdiction. By contrast, as described *supra* at 9-10, this case involves claims filed in a Nevada court, alleging that the actions by defendant's agents, largely in California, in the course of determining whether plaintiff owed certain California income taxes, constituted fraud and intentional infliction of emotional distress. The allegations of wrongs that took place in Nevada appear to be very minor parts of respondent's claim, and as such would not likely suffice to support personal jurisdiction over petitioner for the whole range of claims made by respondent.

In recent years, this Court has refined the constitutional limits on the law of personal jurisdiction and, in doing so, narrowed the circumstances in which general jurisdiction and, to a lesser extent, specific jurisdiction are available to bring in non-residents of the forum state. Beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), followed by *Daimler AG v. Bauman*, 571 U.S. 117, 137-38 (2014), and then *BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549, 1558-59 (2017), the Court has made it clear that general jurisdiction for businesses,

which presumably would include states and localities, is limited to where they are "at home." For them, the Court has ruled that, except in exceptional circumstances, general jurisdiction is limited to their place of incorporation and principal place of business.

For many years, the courts and many business defendants read *International Shoe* and its progeny to permit state courts to exercise general personal jurisdiction in cases in which the challenged conduct did not take place in the forum state, but the defendant was engaged in substantial business there. That is no longer true. The clearest example of the impact of this change in the understanding of general jurisdiction is from *BNSF v. Tyrell*. For years, the railroad, which was not at home in Montana, but had a substantial physical as well as business presence there, was sued, without objection, in state courts there by its employees for accidents that occurred outside of Montana. But it was not until the Court decided *Daimler* that the railroad took its objection to personal jurisdiction to this Court, which rejected the claim of general jurisdiction, ruling that the Montana courts had no personal jurisdiction over claims for injuries unless they occurred in Montana. *BNSF*, 137 S. Ct. at 1359. Thus, while there may have been a colorable claim for general jurisdiction over petitioner when this case was filed, based on California's extensive activities in Nevada, no such claim is likely to be viable today.

The absence of general jurisdiction would not be fatal if the Nevada courts had specific jurisdiction over respondent's claims, but that too

seems unlikely. The essence of respondent's claims is that petitioner's agents committed numerous tortious acts against respondent during the course of its audit of his 1991 California income tax return. As discussed above, they fall into four geographic categories, but most of them occurred entirely or largely outside Nevada, even if their effects were felt by respondent when he was living in Nevada. However, there is little doubt that a claim that petitioner's agents, in the course of an authorized audit of respondent, invaded his privacy by peering into his windows or rummaging through his garbage, would give rise to specific jurisdiction over those claims to which the law of Nevada could properly apply.

The problem for respondent is that those specific acts were a tiny portion of his claims against petitioner during the four month trial as exemplified in the Addendum to this brief which is his statement of facts when this case was previously before this Court. Moreover, even if the Nevada-related facts created a tort for petitioner, they would likely to give rise to only very limited injuries and hence very modest damages, well below the $50,000 upheld by the Nevada Supreme Court on both of his claims. Indeed, one of the claims that was upheld was for fraud, which appears to be unrelated to these invasions of privacy, and the other – intentional infliction of emotional distress – would seem to require much more than these few acts to qualify under Nevada law, as explained by the Nevada Supreme Court in this case. *See Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 741 (Nev. 2017).

At the very least, if specific jurisdiction were to be based on those few acts, the claims based on them would have to be tailored to those acts, unless there were some specific connection made between the Nevada acts and those arising from conduct undertaken in California.

The middle categories – information requests or disclosures sent from California either to third parties or respondent – raise somewhat different specific jurisdiction questions. First, some acts – wrongful disclosures to Japanese companies doing business with respondent – might give rise to specific jurisdiction where the disclosures were made, as well as in California, but not in Nevada. Second, as for requests for information, amici are aware of no case that would confer personal jurisdiction in the state to which the request was directed (here, Nevada), but even if it did, the claim would be probably limited to harms that result directly from that request in Nevada and would not bring in all the other allegedly wrongful conduct that took place elsewhere, mainly in California. *See Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017) (rejecting effort to aggregate claims by non-residents of forum state with claims of residents over same drug and same injury). Third, the wrongful disclosures, if made in Nevada, would provide a jurisdictional hook for those claims, *Calder v. Jones*, 465 U.S. 783 (1984), but not the entire panoply of complaints that respondent presented to the jury at trial. Fourth, as for requests for information from respondent himself, a similar jurisdictional objection would

also apply, but, as discussed above, the greater objection is that Nevada may not rely on its substantive laws to police the efforts of petitioner to audit the tax returns of respondent whose obligation to pay California income taxes was the basis of the audit.

Whether petitioner's defense of lack of personal jurisdiction was preserved, this Court should make it clear that states and their agencies are entitled to defend on grounds of lack of personal jurisdiction and that only specific not general jurisdiction may be used by plaintiffs suing in another state. Indeed, this Court should remind state courts that the first issue that they should address in future cases is whether the court has specific jurisdiction over each of the claims that the plaintiff has alleged. In cases like *Hall*, the answer will surely be that it has jurisdiction, but in cases like this, a much more focused inquiry, directed at the factual basis and geographic location for each claim, must be undertaken.

CONCLUSION

For the foregoing reasons, the decision in *Nevada v. Hall* should not be overruled, but the decision below should be reversed and remanded for further consideration in light of the decision by this Court.

Respectfully Submitted,

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September 18, 2018

ADDENDUM

BRIEF OF RESPONDENT (at 2-4)
FRANCHISE TAX BOARD OF CALIFORNIA
V. HYATT
NO. 14-1175

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." JA259, 265. According to testimony from

a former Board employee, the auditor freely discussed personal information about respondent - much of it false - leading her former colleague to believe that the auditor had created a "fiction" about respondent. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.*, JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *E.g.*, JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places

of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.

No. 17-1299

In the

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF *AMICI CURIAE* MULTISTATE TAX COMMISSION, NATIONAL GOVERNORS ASSOCIATION, AND NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, the Multistate Tax Commission, the National Governors Association, and the National Conference of State Legislatures submit this brief in support of the petitioner, California Franchise Tax Board (FTB), asking the Court to overturn *Nevada v. Hall*. [1]

Amici are organizations whose members include state governors, legislators, and tax officials from across the country. *Amici* regularly file briefs in matters like this one, which raise issues of concern to the nation's states.

The Multistate Tax Commission (MTC), created in 1967 by the Multistate Tax Compact,[2] promotes interstate cooperation by providing a forum for state tax administrators to draft uniform tax laws, conduct joint audits, facilitate the settlement of unreported business taxes, and otherwise cooperate in tax administration.[3]

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[1] No counsel for any party authored this brief in whole or in part. Only the members of the *amici curiae*, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the *amici* on behalf of their organizations and not on behalf of any particular member state. Both parties have filed blanket consent to the filing of *amicus curiae* briefs, in support of either party or of neither party.

[2] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding the Compact).

[3] The Commission is made up of the tax agency heads of states that have adopted the Compact by statute. In addition to these sixteen compact members, thirty-four states are sovereignty or

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies.

This case is before this Court for the third time, and now the call by the states to overturn *Nevada v. Hall* is unequivocal and nearly universal. The case's holding—that a state's sovereign immunity in a sister-state's court is merely a matter of comity—was unimaginable at the time of the Constitution's ratification. Had this been the delegates' understanding, it is impossible to believe they would have consented to the other significant concessions of state sovereignty

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associate members. Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, NorthCarolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. Information on the Commission and its programs is available on its website, http://www.mtc.gov/Home.aspx.

required by our Constitution. The petitioner's arguments, as well as those made by Indiana and the other 44 states, leave no doubt about this conclusion.

Your *amici* do not wish to duplicate these arguments. Instead, we write to emphasize that *Hall* poses a real, ongoing threat to the sovereign right of states to make their own tax policy choices, to enforce their taxes, and to voluntarily cooperate with other states. We also write in response to the suggestion that the solution to *Hall* is simply for states to negotiate an extra-constitutional agreement under which their sovereign immunity would be recognized.

SUMMARY OF ARGUMENT

Under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, states agreed to give preclusive effect to the judgments of other states' courts. But the clause, as interpreted by this Court, grants significant latitude to a state court in determining whether to apply its own or another state's law. Since *Nevada v. Hall*, 440 U.S. 410 (1979), a defendant state can no longer assert its absolute sovereign immunity in another state's courts. Therefore, states may now find themselves liable to plaintiffs for claims that could not be raised by the state's own citizens, as California was here. Moreover, states may face binding adverse judgments subjecting them to the conflicting tax policy choices of the forum state.

Even if state tax policies were identical, *Hall* would threaten tax enforcement. Its holding provides a means to circumvent and disrupt the administrative processes essential for tax enforcement.

But recent events show that, where tax policies differ, *Hall* also allows a kind of forum-shopping to exploit those differences. Nor would the court's "policy of hostility" standard protect defendant state tax administrators from being subjected to the forum-state's policy choices in those cases.

States, although equal in sovereignty, otherwise differ greatly in ways that can affect their policy choices. This is particularly true in the tax area, where their interests diverge for a host of reasons including incentives to compete. But despite their differing interests or incentives to compete, states must also cooperate to ease the burdens of tax administration, and they do so, often by adopting consistent or uniform policies when they can. This Court has recently recognized the value of such cooperative efforts. *Hall* poses a serious threat to interstate cooperation.

Finally, the respondent contends that states may redress these issues by simply negotiating an agreement to recognize each other's sovereign immunity. Ironically, if such an agreement were necessary, *Hall* would likely make it harder to reach. But the states already have such an agreement, the terms of which were painstakingly negotiated 231 years ago. Under our Constitution, when the states agreed to cede a portion of their sovereign rights, they did so confident in their understanding—implicit though it was—that they retained their sovereign immunity, as of right. We ask the Court to honor that understanding.

ARGUMENT

I. In general, under *Hall*, states, as defendants, will be subject to the processes and the choice-of-law decisions of their sister-states' courts.

This case centers on *Hall's* holding that, when ratifying the Constitution, states did not retain the right to assert sovereign immunity in their sister-states' courts. This, in turn, implicates the other explicit concessions of sovereignty made by the states in forming our Constitution, including, in particular, the Full Faith and Credit Clause, and this Court's choice-of-law jurisprudence. This is unfortunate because: "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 496 (2003)(*Hyatt I*)(citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 16 (1945)). *Hall* subjects states to litigation where these choice of law issues are unavoidable.

The Court has long abandoned any attempt to discern a balancing-of-interests or other useful principle to limit the significant discretion that state courts have in making choice-of-law decisions. *Id.* As a result—as this case shows—a defendant state may be subjected to the forum state's substantive law, even if it conflicts with the law of the defendant state, with few apparent limits.

Whether a state court applies the forum state's or the defendant state's law, its judgment will have preclusive effect for the issues fully and fairly litigated, provided that court also determines that it has jurisdiction. *Durfee v. Duke*, 375 U.S. 106 (1963). *See also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691 (1982) (holding that North Carolina could not deny enforcement of an Indiana court judgment even if it found the Indiana court lacked subject-matter jurisdiction). Full faith and credit applies to a judgment despite the court's mistaken application of another state's laws unless the mistake contradicts an established interpretation and is brought to the court's attention during the litigation. *See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) and *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914). Naturally, the assertion of an established interpretation is likely to be a contested issue.

When the court wishes to apply its own law, instead, it need not establish that the forum state had the majority of the contacts with the particular issue. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). A constitutional issue arises only when a court adopts a "policy of hostility" to the laws of the defendant state. *Hyatt I* at 499. But the precise application of this standard is open to debate. *See Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1286 (2016)(Roberts, C.J., dissenting)(*Hyatt II*).

Still, state courts may wish to exercise comity, deferring to the law of a defendant state when there are conflicts between the forum state's and defendant

state's policies. These courts will face the daunting task of weighing competing state policy interests. As this Court observed in *Hyatt I*, "[h]aving recognized, in *Hall*, that a suit against a State in a sister State's court 'necessarily implicates the power and authority' of both sovereigns, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered." *Hyatt I* at 498 (internal citations omitted).

Hall was wrong to conclude that the Constitution had not resolved the inherent conflict between state adjudicatory authority and state sovereign immunity. But this Court was right when it recognized that questions involving competing sovereign interests are difficult to answer. Nevertheless, it consigned state courts to grappling with these questions, despite the "candidly confessed" lack of guiding standards, even when the defendant is a sister state.

It is possible that some limits, previously unknown or unlooked-for, may exist, restraining the ability of taxpayers to challenge the tax policies or practices of one state in the courts of another state. But we believe, as Justice Rehnquist observed in his dissent in *Hall*, "the Court is truly adrift on uncharted waters." 440 U.S. 410 at 443. And so, then, are the states.

II. Under *Hall*, by haling a state's tax agency into the courts of another state, a taxpayer can disrupt tax enforcement and may, in some cases, take advantage of more favorable substantive law.

To be clear, our concerns have nothing to do with whether state courts and state judges may render fair verdicts with respect to their sister states. We are confident that they can. Our concerns are that such suits will disrupt tax administration and create difficult choice of law conflicts.

States, like the federal government, have developed specialized administrative processes for resolving tax matters through their explicit, conditional waiver of sovereign immunity. *See Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002). States bind themselves to these administrative requirements with the expectation that courts will require exhaustion of administrative remedies before allowing a suit involving tax matters to proceed. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989); and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006). States, themselves, must generally follow these processes before they can obtain a final enforceable tax liability against a taxpayer. *See* CAL. REV. & TAX. CODE §§ 19041-47 and 21011. This is why disruption of these processes is particularly problematic.

Indeed, this Court has recognized the essential role such administrative processes play in tax

enforcement, and, consequently, in funding state governments. In *Fair Assessment in Real Estate v. McNary*, the Court faced the question of whether federal courts could dismiss state tax related § 1983 claims if the plaintiff had failed to exhaust the taxing-state's administrative remedies. 454 U.S. 100 (1981). The majority in *McNary* ruled that federal courts should exercise comity to dismiss such suits, observing that the doctrine of restraint "carried particular force, in suits challenging the constitutionality of state tax laws." *Id.* at 108 (internal citations omitted). "[T]he very maintenance of the suit itself would intrude on the enforcement of the state scheme," the majority reasoned, *id.* at 114, taking up limited administrative resources, and potentially resulting in suspension of collection efforts. *Id.* at 115.

In addition to the kinds of problems recognized in *McNary*, an out-of-state suit gives the plaintiff a basis to resist informal requests for information or even subpoenas from the taxing state. The plaintiff may also petition the trial court, as Mr. Hyatt did here, to issue protective orders preventing the use of documents necessary for any administrative proceeding in the taxing state.[4] Plaintiffs may ask the sister-state's court to disregard the taxing state's regulations and rulings as well as other public acts or documents, such as tax notices, assessments, etc., that would have substantial weight in the taxing state's own forum. If the

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[4] *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002) (unpublished table decision), *available at* http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=5165&csIID=5165&deLinkID=184207&sireDocumentNumber=02-05994 (last visited Sept. 10, 2018).

court does so, that decision will typically be subject to review only under the most lenient of standards—abuse of discretion. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998); and *Hyatt v. Franchise Tax Bd.*, 962 N.Y.S.2d 282 (N.Y. App. Div. 2013). Nor would the eventual ruling of the taxing state's administrative forum, assuming it is granted only limited jurisdiction, be entitled to preclusive effect in the sister-state's court. *See Thomas v. Washington Gas Light Company*, 448 U.S. 261 (1980). So even if the defendant state were to attempt to enforce the tax through an administrative proceeding, and even if that proceeding could be concluded despite the interference of the out-of-state suit, the ruling of the administrative tribunal might not be entitled to any effect in that out-of-state suit.[5]

In one recent case, for example, a company domiciled in Kentucky has sued Ohio and its tax commissioner under 42 U.S.C. § 1983, alleging constitutional violations related to state's assertion that it has jurisdiction to impose its Commercial Activity Tax (its gross receipts tax) on the plaintiff. *Great Lakes Minerals, LLC v. Testa*, No. 17-CI-00311 (Ky. Cir. Ct., July 10, 2017), now pending before the Kentucky Supreme Court on interlocutory appeal. (Case No. 2018-SC-000161). While this Court has directed federal courts to require plaintiffs to exhaust administrative

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[5] At least thirty-three states have specialized tax tribunals to hear tax disputes, separate from the state's courts of general jurisdiction. *See* AICPA Chart of States With and Without State Tax Tribunals (Current as of 2/3/2016), *available at* https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf.

remedies when bringing such a claim, there is no such limitation on state courts. Nor is it clear how the Court's decision in *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, (1995)(holding that states that provide an adequate remedy at law are not subject to tax-related § 1983 claims) applies where the suit is brought in a sister-state's court.

Cases have also recently been brought against South Dakota and Connecticut in the courts of other states challenging tax enforcement actions. *See Compl., Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018)(challenging a South Dakota tax audit); *Compl., Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18- 80 (Minn. D. Ct. Mar. 7, 2018)(same); and Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13- 08568 (Tex. D. Ct. Aug. 6, 2013)(challenging the state's efforts to enforce its tax).

III. *Hall* poses the greatest threat, both to state interests and to interstate cooperation, where there is natural tension between state policies which might be exploited under *Hall*.

This Court's dormant commerce clause decisions repeatedly stress that, before the ratification of the Constitution, the states were only too ready to compete rather than cooperate. As these decisions recognize, the states competed chiefly by erecting barriers to interstate commerce favoring local businesses. See for example: *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)(the states "hindered and suppressed interstate commerce"); *Dep't of Revenue of Washington v.*

Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 764 (1978)(the results were "catastrophic"); *Dennis v. Higgins*, 498 U.S. 439, 453 (1991)(there was a "prospect of a descent toward even more intense commercial animosity"); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986)(state "tendencies toward economic Balkanization...plagued relations"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 414 (1994)(state "jealousies in general" led to "retaliatory tariffs" in particular and "poisoned commercial relations"); *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008)("economic protectionism," it was feared, might cause states to retreat into "economic isolation").

The incentives for states to compete with each other to gain an economic advantage are similar to those faced by independent nations. Nor have these incentives gone away. But states are no longer independent nations. They cannot close their borders or impose greater requirements on the citizens of other states who want to take up residence, *Zobel v. Williams*, 457 U.S. 55 (1982), or who wish to practice their profession in the state. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). They have no ability to impose trade barriers or levy tariffs on interstate commerce. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Nor can they discriminate against foreign commerce. *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71 (1992). They cannot discriminate against out-of-state actors by imposing higher or more burdensome taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). And they may not impose, even on their own residents, a tax under a system that would, if imposed by every state,

result in multiple tax burdens. *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787 (2015). The states submitted to these limits, and more, while they retained "a residuary and inviolable sovereignty," *Printz v. United States*, 521 U.S. 898, 919 (1997) (Quoting Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)).

Nevertheless, states can and do compete to offer more favorable tax policies. Most states view these tax policies as central to attracting investment and creating jobs.[6] States are also routinely rated or ranked based on their tax policy choices.[7] The true competitive value of these policy choices is sometimes controversial. For example, there has been substantial debate over whether lower tax rates or more favorable tax policies drive interstate migration.[8] This type of

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[6] *See, e.g., How States Can Gather Better Data for Evaluating Tax Incentives, Solutions for compiling and analyzing information on key economic development programs*, Pew Charitable Trusts, June 26, 2018, seeking to help states evaluate these tax incentive programs, *available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/06/how-states-can-gather-better-data-for-evaluating-tax-incentives.

[7] *See, e.g., 2018 State Business Tax Climate Index*, The Tax Foundation, *available at* https://taxfoundation.org/publications/state-business-tax-climate-index/.

[8] See Chris Edwards, *Tax Reform and Interstate Migration*, Cato Institute, Sept. 6, 2018, *available* at https://www.cato.org/publications/tax-budget-bulletin/tax-reform-interstate-migration#full; *but see* Michael Mazerov, *State "Income Migration" Claims Are Deeply Flawed*, Oct. 20, 2014, Center on Budget Policy and Priorities, *available at* https://www.cbpp.org/research/state-income-migration-claims-are-deeply-flawed.

competition between states is not forbidden and may even be seen as a "healthy form of rivalry." *See Zobel* at 67.

Despite incentives to compete, however, states also need to collaborate for a number of reasons, including to simplify tax administration. For example, this Court recently recognized the importance of the cooperative efforts of a number of states to standardize state sales and use taxes, including their adoption of uniform definitions of products and services, simplified tax rate structures, and other uniform rules. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018)(citing the 24 states that have adopted the Streamlined Sales and Use Tax Agreement). The states have long pursued similar cooperative efforts. For example, furthering interstate cooperation was a driving force behind the creation of the MTC. *See U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 252 (1978)(noting that the purposes of the Multistate Tax Compact include promoting uniformity and compatibility in state tax systems). The MTC's Uniformity Committee, which is open to all states, drafts model tax laws and regulations to address issues of common concern to the states and business taxpayers.[9] The Federation of Tax Administrators is another organization that promotes state tax uniformity, especially in the areas of tobacco and fuel taxes.[10] These efforts

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[9] Information on the MTC Uniformity Committee is available on the MTC website, http://www.mtc.gov/Uniformity/About-Uniformity.

[10] See the Federation of Tax Administrators Motor Fuel Uniformity Project, https://www.taxadmin.org/uniformity-project (last visited Sept. 8, 2018); and the Tobacco Tax Uniformity Project, https://www.taxadmin.org/tobacco-tax-uniformity-project.

serve not only to simplify taxes, lowering the associated risks and compliance costs—especially for smaller, less sophisticated taxpayers—they also help lower administrative costs for states.

States also cooperate to ensure enforcement and collection of taxes. For example, the MTC offers states a multistate joint audit program, allowing them to participate in audits of large multistate businesses for state corporate income or sales and use taxes.[11] States also cooperate together and with the federal government and Canadian provinces, under the International Fuel Tax Agreement, to collect and distribute taxes on motor carriers.[12]

But interstate cooperation is voluntary. And, despite its obvious benefits, participation in cooperative efforts is often inconsistent and far from universal. As commerce becomes ever more globalized and individuals and businesses ever more mobile, striking the right balance between competition and cooperation is critical. States must, therefore, be concerned about anything that might tip that balance.

Hall raises the specter of states used as pawns in economic warfare against their fellow sovereigns. This is contrary to the spirit of the agreement made under the Constitution and the dormant commerce clause. It is also contrary to the states' clear long-term interests.

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[11] Information on the MTC audit program is available on its website, http://www.mtc.gov/Audit-Program.

[12] Information on the International Fuel Tax Association is available on its website, https://www.iftach.org/.

IV. Recent state tax developments show that *Hall* offers the opportunity to challenge state policies through "forum-shopping," frustrating this Court's "policy of hostility" standard, and posing a threat to interstate cooperation.

Under *Hall*, taxpayers may seek and states may provide a forum to challenge the different tax policies of other states. One such case, in Virginia, is *Crutchfield Corp. v. Christopher C. Harding, in his capacity as Massachusetts Comm'r of Revenue, et al.*, Case No. CL17001145-00 (Va. Cir. Ct.). Virginia has adopted a version of a model statute drafted by the American Legislative Exchange Council (ALEC), which:

> gives an in-state business a special declaratory judgment action, which a business can seek in the courts of the state, that will determine if that business has the requisite nexus, or physical presence in another state that would justify the requirement to collect and remit sales and use taxes. And in turn, that judicial determination must be honored in other states courts under the 'full faith and credit' clause of the United States Constitution.[13]

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[13] *See* the Sales and Use Tax Collection Protection Act on the website of the American Legislative Exchange Council, https://www.alec.org/model-policy/sales-and-use-tax-collection-protection-act-2/ (last visited Sept. 9, 2018).
Two other states, Iowa (Iowa Code § 602.6703) and Texas (Tex. Civ. Prac. & Rem. Code § 37.0055) have also adopted versions of the ALEC model.

Crutchfield has filed suit in Virginia challenging the imposition by Massachusetts of a sales tax collection obligation under that state's regulations. Those regulations assert that large Internet vendors are presumed to have specific types of physical presence in the state, and are, therefore, subject to tax collection requirements on their Massachusetts sales. *See* MDOR Regulation 830 CMR 64H.1.7: Vendors Making Internet Sales, effective Oct. 1, 2017.[14] Virginia has no similar regulation and may, presumably, apply a different interpretation of the physical presence standard as applied to these Internet vendors. If Virginia is allowed to assess the validity of the Massachusetts regulation, what is to prevent every other state from doing so, requiring Massachusetts to defend the regulation in every other state's courts?

A similar issue has arisen in New Hampshire, except that lawmakers have said they intend to assess the validity of *all* other states' remote-seller collection statutes. Shortly after this Court's *Wayfair* decision, New Hampshire's governor issued a statement saying, in part: "New Hampshire will erect every possible and constitutionally permissible legal and procedural hurdle to prevent other states from forcing our businesses to collect sales and use taxes." Specifically, the statement suggests that other states' tax agencies might be required to register with the New Hampshire Department of Justice and receive a written

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[14] While this Court's decision in *Wayfair* removed the physical presence requirement imposed under *Quill*, Massachusetts' regulation would control the application of the physical presence test for the period after its effective date.

determination from the Department that their state laws comply with New Hampshire standards.[15] New Hampshire legislators convened in special session on July 25 and considered legislation that would have blocked the tax agencies of other states from trying to enforce sales and use tax collection obligations on sellers in the state. The legislature failed to agree on any specific legislation,[16] but New Hampshire's governor recently announced that the state would be taking other actions to protect New Hampshire businesses.[17]

Hall, no doubt, will prompt some taxpayers to engage in forum shopping, but it may be too soon to tell if states will also compete to offer favorable forums for challenging the different tax laws of other states. The seeds of such a threat have only recently been planted. But these developments should suffice to show that, where state policies differ, *Hall* likely grants certain advantages to those who can sue state tax agencies in out-of-state courts. As Justice Rehnquist observed, correctly, *Hall* provided no clear

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[15] *See* News Release: *New Hampshire to Fight Back - Governor Sununu and State Leaders Unveil Strategy To Fight Supreme Court Sales Tax Case*, June 28, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180628-sales-tax.htm.

[16] Holly Ramer, *N.H. House rejects South Dakota v. Wayfair sales tax response, heads back to drawing board*, Concord Monitor, July 26, 2018, *available at* https://www.concordmonitor.com/Back-to-drawing-board-after-House-rejects-sales-tax-bill-19061942.

[17] See News Release: *Governor Sununu Announces Executive Branch Action Regarding the Wayfair Decision*, August 23, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180823-wayfair.htm.

limits on when one state might be made to answer claims under another state's law, in another state's court. He also warned that, "given the ingenuity of our profession, pressure for such limits will inevitably increase." *Hall* at 443 (Rehnquist, J. dissenting).

The Court has held that a state may not exhibit a policy of hostility toward a defendant state. *Hyatt I* at 489 (citing *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). In this case, for example, the Court has ruled that this policy of hostility standard requires Nevada to cap the petitioner's liability at the maximum amount that could be imposed on Nevada's own tax agency. *Hyatt II*. But this policy of hostility standard is ineffective where there are more fundamental differences in state laws. Take, for example, New Hampshire's potential efforts to limit other state's enforcement of their sales taxes by requiring those states to show that their laws comply with a standard set by New Hampshire. The Court will not be able to compare the standard New Hampshire imposes when evaluating the laws of other states to the standard it imposes on its own enforcement of sales tax, because New Hampshire has no sales tax.

Finally, the kinds of developments described above may also interfere with the ability of states to engage in cooperative efforts to simplify state tax systems by adopting uniform rules. States may, instead, face pressure to provide their businesses with a means to exploit the differences in state tax policies using *Hall*.

V. Hall fails to recognize that under our Constitution, states agreed to cede certain sovereign rights while retaining others, including sovereign immunity; this failure cannot be remedied by the unilateral exercise of comity, or by some type of "side agreement" to recognize sovereign immunity assuming one could be negotiated.

In ratifying the Constitution, the states ceded significant amounts of their sovereignty. Under the Full Faith and Credit Clause, as we have noted, they have no choice but to enforce the judgments of their sister-states' courts, including tax judgments. The significance of this concession among sovereigns should not be underestimated. For example, while countries today may enforce some types of judgments rendered by the courts of other countries, they do so only by negotiated agreement.[18] Most countries still do not recognize another country's tax judgments, a rule known as the "revenue rule." This Court acknowledged the revenue rule most recently in *Pasquantino v. United States*, 544 U.S. 349 (2005), in which it explained that the rule "at its core" prohibits "the collection of tax obligations of foreign nations." The Court described the "principal evil" against which the rule was thought to guard as "judicial evaluation of the *policy-laden enactments of other sovereigns*." *Id.* at 368 (emphasis added). Imagine how such "policy-laden enactments" might be viewed where the defendant against whom the judgment is rendered is not a private actor but a

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[18] *See* the Foreign-Country Money Judgments Recognition Act, *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

fellow sovereign. Yet *Hall*'s ruling effectively presumes that the states intended to give these judgments full faith and credit, as well.

And even though this Court's choice-of-law jurisprudence provides no guiding standards, *see Hyatt I* at 498, *Hall's* ruling also resigns states, and their courts, to resolving difficult conflicts between the sovereign interests embodied in differing state policies. Indeed, before a court can properly exercise comity, even to dismiss a suit, it must first consider the substantive issues presented by the case. *See Schoeberlein v. Purdue University*, 544 N.E.2d 283 (Ill. 1989)(in which the Illinois supreme court considered a number of factors for and against granting dismissal under principles of comity, noting that other courts were split on the issue).

Critically, courts cannot, in their discretion, exercise comity to grant dismissal if the forum state's interests are sufficiently important. In other words, in the very cases where it may matter most, where the laws of the forum and defendant state conflict, the forum state's court may well conclude that it has no discretion. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1144 (N.Y. 2006)(reasoning that it is when there is "no material conflict" between forum-state and defendant-state policies that "our courts of course remain open to reasonable deference to the law of another jurisdiction . . ..").

Nor can an agreement between the states to recognize sovereign immunity possibly substitute for the binding commitment the states believed they made in ratifying the Constitution. First, unless it is universal,

such an agreement will not have the effect of foreclosing the threats discussed above. Second, unless, once negotiated, the agreement is also approved by Congress, it will not be binding as federal law. *Cuyler v. Adams*, 449 U.S. 433, 434 (1981). Even in if Congress were to approve it, states that are willing to forego the benefit of the agreement would, presumably, be allowed to withdraw at any time. In any case, the conflicting interests and competitive pressures that naturally exist between the states make the prospect of reaching any comprehensive, binding agreement unlikely.

CONCLUSION

In the time since the Court first considered this case, the threat *Hall* poses to state sovereign interests and interstate cooperation has only grown. The concerns expressed by the dissenters in *Hall*, are now beginning to be realized. This Court should correct the mistake it made in 1979 by acknowledging the fundamental understanding that states had at the time of the ratification of the Constitution—that, while they ceded substantial sovereign rights, they retain their sovereign immunity.

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No. 17-1299

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF PROFESSORS OF FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about the law governing litigation within our federal system, including state sovereign immunity. *Amici* hold varying views on the constitutional status and substantive scope of state sovereign immunity. We also take no position on the merits of the decisions below.

Instead, we come together in this case, as some of the same *amici* did in *Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277 (2016) ("*Hyatt II*"), solely to address the question presented—"[w]hether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled." As we explain in the brief that follows, we are of the view that (1) *Hall* was (and remains) rightly decided; and (2) if, contra *Hall*, the Constitution were interpreted to confer absolute sovereign immunity upon states in their sister states' courts, such a result would either leave litigants like Respondent with no forum for patently meritorious claims against offending states, or it would place significant—and, in our view, untoward—pressure on this Court's original docket.

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[1] The parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Both the Constitution itself and this Court's jurisprudence reflect a critical—and principled—distinction between two different species of state sovereign immunity: a state's immunity in its own courts and its immunity in the courts of another sovereign. "The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Hall*, 440 U.S. at 414; *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (quoting *The Federalist* No. 81 (Alexander Hamilton)).

A sovereign's immunity in the courts of another sovereign, in contrast, does not inhere in its sovereignty, *see, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822), and is therefore not a matter of absolute right, but rather one that is typically resolved by reference to the doctrine of comity, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). Like other common-law principles, comity can be overridden by positive law, just as the Eleventh Amendment overruled this Court's rejection of state sovereign immunity in federal courts in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). But neither Petitioner nor its numerous *amici* can identify a single source of positive law that expressly confers the categorical sovereign immunity it seeks. *See Alden*,

527 U.S. at 738 (endorsing *Hall*'s holding that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another").

Not only was *Hall* therefore rightly decided, but, by depriving private parties of a forum in which to sue another state without its consent, the categorical sovereign immunity Petitioner seeks would cause mischief—either for the rights of litigants like Respondent or for this Court's institutional role. Even assuming *arguendo* that states may sue their sister states to vindicate the private rights of their citizens, *but see Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911), such suits may only proceed in this Court's original jurisdiction. See 28 U.S.C. § 1251(a). Although sovereign immunity would not apply in such a case, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838), this Court "is not suited to functioning as a *nisi prius* tribunal." *Maryland v. Louisiana*, 451 U.S. 725, 761 (1981) (Rehnquist, J., dissenting). "Such actions tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971)), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted).

Thus, the rule Petitioner and its *amici* seek would not only put pressure on whether a state can (and would) sue whenever one of its citizens is aggrieved by

a sister state, but, if such suits do go forward, would thereby portend an uptick in this Court's original docket—one that would necessarily come at the expense of this Court's "primary responsibility" as a court of last resort on matters of federal law.

ARGUMENT

I. *Nevada v. Hall* Was Rightly Decided.

At its core, this Court's state sovereign immunity jurisprudence reflects two fundamental premises: "that the States entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and that "[i]t is inherent in the nature of [that] sovereignty not to be amenable to the suit of an individual without its consent." *Hans*, 134 U.S. at 13 (quoting The Federalist No. 81 (Alexander Hamilton)). Although Petitioner and its amici read this latter principle as extending to suits by virtually all comers in all forums, Hall correctly reiterated the nuanced—if at times elusive—distinction that this Court has always drawn between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign. To reach the conclusion that Hall was wrongly decided, this Court would not only have to collapse this distinction, but it would necessarily open the door to revisiting the myriad precedents that depend upon it.

A. This Court's Precedents Distinguish Between a Sovereign's Immunity in Its Own Courts and Elsewhere.

As Justice Stevens explained for the Court in *Hall*, "The doctrine of sovereign immunity is an amalgam of

two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." 440 U.S. at 414. The reason for this bifurcation has everything to do with the unique status of the states in the years between the signing of the Declaration of Independence and the ratification of the Constitution—as "sovereign states, possessing . . . all the rights and powers of independent nations over the territory within their respective limits." *Wharton v. Wise*, 153 U.S. 155, 166 (1894) (emphasis added); *see also McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796).

Thus, when the original states ratified the Constitution, they retained those aspects of the sovereignty they enjoyed as independent nations other than those which were surrendered to the federal government through the "plan of the convention." *See Alden*, 527 U.S. at 717. Whether or not, pace *Alden*, that sovereignty extended to immunity from suits under federal law, "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Hall*, 440 U.S. at 414; *see also Alden*, 527 U.S. at 715–17; *Hans*, 134 U.S. at 13.

B. At the Founding, Sovereign Immunity in the Courts of Another Sovereign Was a Matter of Comity.

The fact "that the States entered the federal system with their sovereignty intact," *Blatchford*, 501 U.S. at

779, hardly proves that they enjoyed immunity as an absolute right in courts of *other* sovereigns at the Founding; as Chief Justice Marshall noted in *The Schooner Exchange*, recognizing such immunity on the part of a foreign sovereign "would imply a diminution of [the home state's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." 11 U.S. (7 Cranch) at 136. In other words, where the interests of multiple sovereigns were implicated, the immunity inherent in a sovereign's home courts ran headlong into the foreign state's sovereign interest over its territory (and, as such, its tribunals).

This is not to say that sovereigns were therefore entitled to no special treatment in the courts of foreign sovereigns; quite the contrary. But "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* Thus, proper respect for sovereignty suggested that such consent could be presumed as a matter of comity. *See id.* at 136–37. Because it sounded only in comity, though, such immunity could therefore be withdrawn (with appropriate notice) when the foreign sovereign's own interests justified such a measure. *See id.* at 146; *see also The Santissima Trinidad*, 20 U.S. (7 Wheat.) at 352–53.

This Court has repeatedly reaffirmed the underlying soundness and continuing implications of these principles—not just in *Hall*, but throughout its *foreign* sovereign immunity jurisprudence, as well. *See, e.g., Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816,

821 (2018); *Samantar v. Yousef*, 560 U.S. 305, 311 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848, 851 (2009); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865–66 (2008); *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Unless *The Schooner Exchange* was wrongly decided—and all of these successive cases therefore wrong to rely upon it—then at the time of the Founding, a state's immunity in the courts of another sovereign was not an absolute right, but was rather a matter to be resolved through the doctrine of comity. *See generally Verlinden B.V.*, 461 U.S. at 486. ("As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

C. No Constitutional Text Overrides That Founding-Era Understanding.

Needless to say, principles of comity, deriving as they do from the common law, can be overridden by express statutory or constitutional command. So it was that this Court's decision in *Chisholm*, 2 U.S. (2 Dall.) 419, provoked the adoption of the Eleventh Amendment, and its clarification that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Although disagreement persists as to the scope of the Eleventh Amendment, what cannot be gainsaid is

that provision's distinct relationship to the inherent sovereign immunity with which states entered the Union. As Justice Thomas has explained,

> Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but *one particular exemplification* of that immunity.

Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) (quoting *Alden*, 527 U.S. at 723) (emphasis added). Thus, the Eleventh Amendment provided the express constitutional command necessary to override the understanding that, rightly or wrongly, had driven the Justices comprising the majority in *Chisholm* to conclude that Article III authorized—and sovereign immunity did not preclude—the exercise of federal judicial power over a suit by a citizen of one state against another state. *See* 2 U.S. (2 Dall.) 419.

If Chief Justice Marshall's articulation of foreign sovereign immunity at the Founding, *see* Section I.B, *supra*, is correct, then Petitioner must identify some comparable constitutional command that overrode those principles. Instead, Petitioner (repeatedly) asserts that foreign sovereign immunity simply has no

bearing on the immunity of a state in the courts of its sister states—"[b]ecause the Constitution allows States to vindicate their sovereign immunity against other States in a way that independent nations cannot." Pet. Br. 33. In essence, Petitioner's argument is that Article III of the Constitution itself, by investing this Court with original jurisdiction in cases "in which a State shall be a Party," U.S. CONST. art. III, § 2, cl. 2, necessarily vitiated the relevance of foreign sovereign immunity principles to the Question Presented here. *See also* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249.

As Professor Woolhandler herself notes, "During ratification and through the Court's *Chisholm* decision, debate arose over whether Article III and the state/citizen diversity provision (1) preserved state immunities, or (2) effected a waiver of sovereign immunity." *Id.* at 253. Whoever had the better of this argument (a debate that continues today with respect to state sovereign immunity under federal law), no one suggested that, in fact, Article III recognized a new form of immunity *because* it created a new forum for suits against unconsenting states. Thanks to *The Schooner Exchange*, however, this would have to have been the case in order for Petitioner to be correct—and for *Hall* to have been wrongly decided.

Aside from the paucity of contemporaneous historical evidence, this reading of Article III suffers from two separate—yet equally fatal—flaws: *First*, and logically, it would be more than a little odd to conclude that the Founders *expanded* state sovereign immunity solely by *authorizing* federal jurisdiction. *Second*, and

more pragmatically, this reading of Article III is belied by the ineluctable fact that the jurisdiction authorized by Article III did not have to be—and never has been—exclusive.[2] If Article III's drafters meant, by authorizing *federal* judicial power in such cases, to displace pre-existing *state* authority over suits against other sovereigns, it stands to reason that they would have made their intentions far clearer. *See, e.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990) (describing the presumption in favor of concurrent jurisdiction between state and federal courts—and its structural implications).

Thus, *Hall* correctly concluded that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this

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[2] Congress has subsequently chosen to make this Court's original jurisdiction exclusive in suits between states, *see* 28 U.S.C. § 1251(a), but not in suits between states and other parties, *see id.* § 1251(b)(2), (3).

In any event, nothing in Article III *compels* the exclusivity of this Court's state-state jurisdiction. *See, e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 78 n.1 (1992) ("Neither party disputes Congress' authority to make our original jurisdiction exclusive in some cases and concurrent in others. This distinction has existed since the Judiciary Act of 1789, and has never been questioned by this Court." (citation omitted)); *see also Ames v. Kansas ex rel. Johnston*, 111 U.S. 449 (1884) (upholding the constitutionality of concurrent original jurisdiction); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 271 (7th ed. 2015) ("Since 1789, Congress has assumed that the Supreme Court's original jurisdiction could be made concurrent with the jurisdiction of the lower federal courts or of state courts.").

Court to impose limits" on a state's power to entertain a suit against another state. 440 U.S. at 420. Whatever the Constitution may have originally provided with respect to a state's amenability to suit in federal court and/or under federal law, as Justice Kennedy put it for the *Alden* majority, "the Constitution did *not* reflect an agreement between the States to respect the sovereign immunity of one another." *Alden*, 527 U.S. at 738 (emphasis added). Unless Justice Kennedy was wrong, *Hall* was right.

* * *

Of course, the fact that unconsenting states at the Founding did not inherently possess sovereign immunity in the courts of their sister states as a matter of absolute right does not (and did not) mean that they therefore lacked sovereign immunity in many—if not most—cases. It is unquestionably true that, at the Founding, states were generally not subject to suit in their sister states' courts. But as *Hall* correctly understood, this result sprung not from an absolute interstate sovereign immunity doctrine, but rather from the absence of sufficiently strong justifications in most cases for overriding the comity-based sovereign immunity that states then enjoyed. Thus, proper resolution of the Question Presented does not turn on whether states generally enjoyed interstate sovereign immunity at the Founding; it turns on whether the Founders constitutionalized that immunity through Article III. As *Hall* correctly concluded, though, that question answers itself.

II. Overruling *Hall* Could Place Undue Pressure on This Court's Original Docket.

A. It Is Not Clear Whether This Court's Original Jurisdiction Could Properly Resolve Respondent's Claims.

If, notwithstanding the above analysis, this Court were to hold that *Hall* was wrongly decided (and that principles of *stare decisis* do not support its retention), the result would usually be to leave individuals such as Respondent without *any* forum in which to sue an unconsenting state that acts unlawfully outside its borders.[3] In such a case, the only judicial remedy that might plausibly be available for injuries such as those sustained by the Respondent here would be a suit by Respondent's *state* against Petitioner, since states do not enjoy any form of sovereign immunity in suits brought by their sister states. *See, e.g.*, *South Dakota*, 192 U.S. at 318; *Rhode Island*, 37 U.S. (12 Pet.) at 720.

Even assuming a state would choose to expend the considerable resources necessary to bring such suits, this Court has, in the past, expressed significant skepticism as to whether states have standing to sue their sister states as *parens patriae* solely to vindicate the rights of their citizens. *See, e.g.*, *Oklahoma*, 220 U.S. at 289; *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam) (explaining that it is

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[3] As one of us has recently explained, in such cases, *Hall* has the salutary effect of preserving the availability of remedies for "interstate non-federal civil rights" harms. *See* Louise Weinberg, *Saving Nevada v. Hall*, at 15–16 (unpublished manuscript, Nov. 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254349.

"settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"). *See generally South Carolina*, 558 U.S. at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Original jurisdiction is for the resolution of *state* claims, not private claims.").

To be sure, if states would lack standing to pursue cases such as this one, that is only further reason why the rule Petitioner and its *amici* seek would cause mischief—insofar as it would pretermit any remedy whatsoever, and thereby provide no legal deterrent for states to mistreat citizens of other states outside their borders (unless those states then voluntarily consent to suit for such abuses). But assuming *arguendo* that states would have standing to sue their sister states on facts comparable to those presented here, such suits may only proceed in this Court's original jurisdiction. *See* 28 U.S.C. § 1251(a).

B. This Court Has Increasingly Disfavored Reliance Upon Its Original Docket Except Where Absolutely Necessary.

That this Court might have the formal *authority* to exercise original jurisdiction over state-state suits arising out of facts like those presented here does not mean that this would be an especially wise alternative to the status quo. After all, "[t]he Court . . . is not suited to functioning as a *nisi prius* tribunal." *Maryland*, 451 U.S. at 761. Among other practical, logistical, and structural downsides, "[s]uch actions tax

the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" *South Carolina*, 558 U.S. at 267 (quoting *Wyandotte Chemicals Corp.*, 401 U.S. at 498), and by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *Id.* (citation and internal quotation marks omitted).

All of these concerns help to explain Chief Justice Fuller's admonition that this Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute," *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), even in cases in which it is putatively exclusive. *See Texas v. New Mexico*, 462 U.S. 554, 570 (1983) ("[W]e have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction."); *see also, e.g., Louisiana v. Mississippi*, 488 U.S. 990 (1988) (mem.) (denying leave to file a bill of complaint over a three-Justice dissent).

Thus, the rule Petitioner and its *amici* seek would not only put pressure on a state to invoke this Court's original jurisdiction whenever one of its private citizens is aggrieved by a sister state, but it thereby "has the potential to alter in a fundamental way the nature of our original jurisdiction, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests." *South Carolina*, 558 U.S. at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part). As the younger Justice

Harlan presciently warned over four decades ago,

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. . . . It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies. . . . [T]he evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.

Wyandotte Chemicals, 401 U.S. at 497–98 (1971).

Without question, state courts are a better forum for such disputes in the first (and, most cases, last) instance. And as *amici* have demonstrated, *Hall* correctly determined that the Constitution does not prevent them from serving such a role. Given the "anomalous" result that would otherwise follow, *see id.*; *cf. Hans*, 134 U.S. at 10 (invoking a similarly "anomalous result" as justification for applying the

Eleventh Amendment to suits by a citizen against his own state), *Hall* not was rightly decided—and there is no compelling reason to overrule it today.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that *Nevada v. Hall* should not be overruled.

Respectfully submitted,

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APPENDIX

APPENDIX

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